

REPORTS
OF
CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

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*Sit ergo in jure civili finis hic, legitimæ atque usitatæ in rebus causisque
civium æquabilitatis conservatio.* CICERO.

VOL. I.

Containing the Cases of HILARY, EASTER, and TRINITY Terms,
In the 53d Year of GEORGE III. 1813.

L O N D O N :

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1814.

J U D G E S
OF THE
COURT OF KING'S BENCH,

During the Period of these REPORTS.

EDWARD LORD ELLENBOROUGH, C.J.
SIR NASH GROSE, Knt.
SIR SIMON LE BLANC, Knt.
SIR JOHN BAYLEY, Knt.
SIR HENRY DAMPIER, Knt.

ATTORNEYS-GENERAL

SIR THOMAS PLUMER, Knt.
SIR WILLIAM GARROW, Knt.

SOLICITORS-GENERAL.

SIR WILLIAM GARROW, Knt.
SIR ROBERT DALLAS, Knt.

A N

I N D E X

TO THE

PRINCIPAL MATTERS.

ACTION UPON THE CASE,

See PLEADING, 1.

AFFIDAVIT,

See PRACTICE, 2.

WHERE an affidavit of debt contained no place in the jurat, but purported to be sworn before the Chief Justice of the King's Bench of *Ireland*, and to be signed by him, and such signature was verified by affidavit here: Held that it was sufficient foundation for arresting the defendant under a Judge's order on mesne process. *French v. Bellew and Cullimore, E. 53 G. 3.* Page 302

AGREEMENT,

See BANKRUPT, 1. CONTRACT.

Where it was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff free of expence, which were accordingly carried for two years, but

there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, unless entered and paid for, &c. Held that the defendants were not liable for the loss of a parcel of above the value of 5*l.*, sent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants. *Thomas Bignold and John Cockfedge Bidnold v. William Waterhouse, John Waterhouse, Samuel Waterhouse, John Watson, and Thomas Coldwell, E. 53 G. 3.* Page 255

AMENDMENT.

Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the Court will not give leave to increase the sum in the declaration and rule of reference on an affidavit that a larger sum will probably be proved before the arbitrator. *Pearse v. Cameron, T. 53 G. 3.* 675

ANNUITY.

Where the grantor of an annuity by deed conveyed to the grantees all his estate in the interest of 10,000*l.*, in trust for himself until default in payment, and after default to retain thereout the arrears, &c., and after retaining the arrears, upon further trust for himself: Held that a memorial, which stated that the interest of the 10,000*l.* was by the deed conveyed to the grantees *upon the trusts thereby declared*, was delective; although the grantor had not the legal estate in the interest of the 10,000*l.* at the time of his conveyance of it to the grantees, but the same was vested in trustees in trust for him, after deducting certain annual payments, and the trustees did not join in conveying their interest to the grantees. *Leycester and Others v. Lockwood*, E. 53 G. 3. Page 527

APPEAL,

See JUSTICES, 1, 2. MANDAMUS, 4, 5.
NOTICE, 1, 2.

Where an order of removal was made and executed on the day before the holding of the *Epiphany* sessions, and the parish to which the pauper was removed, gave due notice and entered their appeal at the *Easter* sessions, at which sessions the justices refused to hear the appeal, on the ground that it should have been entered at the *Epiphany* sessions; this Court granted a mandamus to the justices to receive such appeal, notwithstanding it appeared that the *Epiphany* sessions continued for fourteen days, and were afterwards twice adjourned to distant days, and that it was the practice of the sessions to allow appeals to be entered at any time during their continuance, or at the adjournments, and to respite the hearing to the next sessions.

The King v. The Justices of Surrey.
E. 55 G. 3. Page 479

APPRENTICE,

See SETTLEMENT BY APPRENTICESHIP, 1. SETTLEMENT BY HIRING AND SERVICE, 2.

In an indenture of apprenticeship a covenant by the apprentice to allow his master 2*s.* per week, and to have wages, and provide for himself during the term, does not require the additional stamp required by 4*G.* 3. c. 98. upon an indenture where a sum of money is contracted for with the apprentice. *The King v. The Inhabitants of the Township of Bradford*, H. 53 G. 3. 151

ARREST,

See BAIL, 5.

ASSUMPSIT,

See MONEY HAD AND RECEIVED.

1. Where the master of the plaintiffs' ship entered into a charter-party, as agent for the plaintiffs, with the defendant, a partner in the house of *M.* and Co., for the delivery of goods upon a stipulated freight, and the goods were delivered to *M.* and Co, who were the consignees named in the bill of lading: Held that the plaintiffs could not maintain *assumpsit* against the defendant for the freight. *Schack and Another v. Anthony*, T. 53 G. 3. 573
2. Where the plaintiff, a druggill, after the 42 G. 3. c. 38., but before the 51 G. 3. c. 87, sold and delivered drugs to the defendant, a brewer, *knowing that they were to be used in the brewery*: Held that he could not recover the price of them. *Langton and Others v. Hughes and Another*, T. 53 G. 3. 595

ATTACHMENT,

See PRACTICE, 4.

ATTORNEY.

1. The lien of the plaintiff's attorney upon the debt and costs recovered in the cause after affirmance upon writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff; and costs in error are costs in the cause. *Midleton v. Hill and Another*, H. 53 G. 3. Page 240
2. An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment; therefore where C. gave his attorney a specific sum for the purpose of satisfying a debt for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt: Held that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptance from C. for the amount of that balance before the lease came to his hands, some of those acceptances when the lease did come to his hands having been dishonored, and one of them taken up by the attorney. *Stevenson and Another, Assignees of Collis, a Bankrupt, v. Blakelock, Gentleman*, E. 53 G. 3. 535

ATTORNEY, WARRANT OF,
See WARRANT OF ATTORNEY.

AWARD.

1. Where a cause was referred under a Judge's order with a proviso that the arbitrator should make his award on or before a day certain; but if he should not be then prepared, that the time should be enlarged

from time to time, as he might require, and a Judge of the court might think reasonable and just: Held, that the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the Judge's order, granting such further time, was not obtained until a day subsequent. *Reid v. Fryatt*, H. 53 G. 3. Page 1

2. Where two parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and conclusive, though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. *Price v. Hollis*, H. 53 G. 3. 105
3. Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the Court will not give leave to increase the sum in the declaration and rule of reference on an affidavit that a larger sum will probably be proved before the arbitrator. *Pearse v. Cameron*, T. 53 G. 3. 675
4. It seems that under a reference of all matters in difference the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken. *ib.*

BAIL,

See COSTS, 4.

1. If in a joint action against two the recognizance of bail be drawn up by mistake in an action against one only, and the plaintiff after two writs of sci. fa. against the bail, and nihil returned to them, sign judgment.

ment against the bail and take out execution, the Court will set aside the judgment and execution for irregularity. *Holt v. Frank and Another*, H. 53 G. 3. Page 199

2. Bail in error are not chargeable in an action upon the recognizance with mesne profits, where they have not been ascertained by writ of inquiry pursuant to 16 & 17 Car. 2. c. 8. *Doe v. Reynold's and Sawyer*, (Bail in Error,) E. 53 G. 3. 247

3. Where the plaintiff in error within four days after being ruled to put in better bail, viz. on the day after *Hilary* term, gave notice that he should justify the same bail on the first day of the ensuing term, and two days before the first day of that term gave notice of fresh bail: Held that the latter bail were not entitled to justify, there being no reason assigned for the non-attendance of the former bail. *Lunn v. Leonard*, E. 53 G. 3. 366

4. Where the plaintiff in error was ruled in vacation to put in better bail, and took no notice of it until four days before the next term, when he gave notice of added bail for the 1st day of the term: the Court would not permit the bail to justify. *Ostreich and Another v. Wilson*, E. 53 G. 3. 367. n.

5. Bail attending to justify are entitled to protection from arrest on mesne process. *Rimmer v. Green*, T. 53 G. 3. 638

BANKER,

See **BILLS OF EXCHANGE**, 6.
SET-OFF, 2.

BANKRUPT,

See **PARTNERS**, 2. **SET-OFF**, 4.
TROVER.

1. Where, by agreement between B. and the defendant, B. agreed, on payment to him of a sum certain, to

convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that after formal possession delivered to the defendant, B. should be allowed to remain in possession for three months without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and B. afterwards left in possession according to the agreement, who became bankrupt whilst he so remained in possession, and before the expiration of the three months: Held that this was not a possession by the bankrupt within the statute 21 Jac. 1. c. 19. s. 11. *Muller and Another, Assignees of Meek, a Bankrupt, v. Moss*, E. 53 G. 3. Page 325

2. Where a trader, upon being arrested for a debt of 135*l.*, escaped from the officer and fled into the house of another, and was pursued by the officer and inquired for at the house, but was denied and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark returned home to his own house, and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber: Held that this constituted one or more act or acts of bankruptcy, under the words of the statute, "beginning to keep house," or, "otherwise absenting himself;" and a creditor of the bankrupt, who had sued out a writ against him, and, without proceeding upon it, afterwards received from him a bill of exchange in part-payment of his debt, after being apprised that there had been a meeting of his creditors, and that the bankrupt's affairs at that time were only capable of paying the demands of his creditors by instalments, although he was assured by the bankrupt's agent that they would

would come round, was liable to refund the proceeds of such bill to the assignees of the bankrupt, as a payment not in the usual course of trade, and before notice of his insolvency. *Bayly and Others, Assignees of Luckraft, a Bankrupt, v. Schofield and Another, E. 53 G. 3.*

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1. Where S. obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one which had been discounted), and also two bank notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a com-

S., the assignees under which commission brought trover against the defendant for the bills and bank notes: Held that the defendant was entitled to retain them. *Gladstone and Others, Assignees of James Sill and Wm. Watson, Bankrupts, v. Hadwen, E. 53 G. 3.* 517

- .. Where R., a tradesman, being arrested at the suit of the defendant upon a ca. sa, placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the defendant: Held that the assignees of R., who had committed an act of bankruptcy before the arrest, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking

of the goods by the sheriff's officer and although the money paid to the defendant was not the identical money raised by the pledge. *Allanfon and Another, Assignees of Roberts, a Bankrupt, v. Atkinson, T. 53 G. 3.* Page 583

- . Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home: Held that this was an act of bankruptcy within the words of 13 Eliz. c. 7. and 17. 1. c. 15. "otherwise absenting himself to the intent to delay creditors," although it appeared that not only no creditor was delayed, but that none could possibly be delayed. *Clenworth v. Hay, T. 53 G. 3.* 676

BARON AND FEME,

See HUSBAND AND WIFE.

BASTARD,

See BOND, 1.

BEER,

See DRUGS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See MONEY HAD AND RECEIVED, 3.

1. A presentment of a bill of exchange at a banking-house after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer: and no inference is to be drawn from the circumstance of the bill being presented

- sented by a notary, that it had been before duly presented within banking hours. *Elford and Others v. Teed, H. 53 G. 3. Page 28*
2. Where partners resident in Ireland signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to *B.* in England for his use, who filled up the blanks and negotiated it: Held, that this was to be considered a bill of exchange by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary. *Snaith and Others v. Mingay and Others, H. 53 G. 3. 87*
 3. Where the drawer of a foreign bill of exchange at the time of the drawing was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest was left at the drawer's house: Held that this was sufficient. *Robins v. Gibson, E. 53 G. 3. 288*
 4. Where *S.* obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one which had been discounted), and also two banknotes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against *S.*, the assignees under which commission brought trover against the defendant for the bills and bank-notes: Held that the defendant was entitled to retain them. *Gladstone and Others, Assignees of James Sill and William Watson, Bankrupts, v. Hadwen, E. 53 G. 3. Page 517*
 5. Notice to the drawers of non-payment of a bill of exchange by sending to their counting-house, during hours of business on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Crosse and Others, Assignees of Fea and Others, Bankrupts, v. Smith, Thompson and Others, E. 53 G. 3. 545*
 6. Persons who are bankers both for the drawers and acceptor of a bill, and have received it from the drawers, and given credit for it in an account current between them, if before it becomes due they receive directions from the acceptor to stop the payment of it at the place of payment, and do so accordingly, are not bound to give notice of this circumstance to the drawers, but upon non-payment of the bill may look to the drawers, notwithstanding they have not given such notice: and they are not bound to apply the money of the acceptor in their hands in discharge of the bill; but if the drawers become bankrupt, it will constitute an item in the account between them and the bankers. *ib.*
 - Where the drawer of a bill of exchange, accepted payable at *B.* and Co.'s; after keeping it three or four years indorsed it to plaintiff, erasing the name of *B.* and Co., and substituting *E.* and Co. without

without the knowledge of the acceptor, *B. and Co.* having failed since the acceptance: Held that plaintiff could not recover against the acceptor. *Tidmarsh v. Grover*, T. 53 G. 3. Page 735

BISHOP.

A statute made in 1663 by the Bishop, with the consent of the Chapter of *Exeter*, conferring upon every canon residentiary, who should cease to be such by *promotion to a higher degree and dignity* in the Church of England (unless it be by *voluntary resignation*, &c.) the right of receiving to his own use the whole profits and advantages of the canonry for the following year, supposing such a statute to be valid, is at all events contrary to the policy of the ecclesiastical establishment, and to be construed strictly: therefore, where the defendant, who was Dean and Canon of that Chapter, resigned the same in order to obtain promotion to another deanery, to which he was shortly afterwards promoted: it was held that he was not within the statute, not having ceased to be a member of the former church by promotion to the latter, but having ceased to be so before his promotion: and besides, his resignation having been voluntary, he was expressly excluded by the terms of the exception; and a promotion from one deanery to another, seems not a promotion to a higher degree. The admission of the plaintiff as Canon into plenum jus, although not made until a year after his first admission, related back to the time when his title to the profits accrued, so as to enable him to maintain an action for them. *Garnett D. D. v. Gordon D. D.*, H. 53 G. 3. 205

BOND.

A bond given to parish officers reciting that *B.* had taken a house in the parish for a term of 7 years, and conditioned to indemnify the parish against any charges which they might sustain on account of *B.* and his family becoming inhabitants of and belonging to the parish, is not discharged by *B.*'s purchasing an estate of the value of 30*l.* in the parish, and residing on it upwards of 40 days after the expiration of the 7 year's lease. *Edwards and Another v. Dobbit*, H. 53 G. 3.

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Where the putative father of a bastard child gave a *voluntary* bond, and not under the compulsion of stat. 6 G. 2. c. 31., to the parish officers conditioned for the payment of a sum certain every three months until the child should be deemed capable of providing for herself: Held that such bond was good, and the condition sufficiently certain. *Middleham v. Bellerby*, E. 53 G. 3.

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BRIDGE,

See INDICTMENT.

BRISTOL CANAL COMPANY,

See EVIDENCE, 5.

BROKER,

See SET-OFF, 1. 3.

CANON,

See BISHOP.

CARRIER.

Where it was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff free

free of expence, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, unless entered and paid for, &c. Held, that the defendants were not liable for the loss of a parcel of above the value of 5*l.*, sent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants. *Thomas Bignold and John Cockfedge Bignold v. William Waterhouse, John Waterhouse, Samuel Waterhouse, John Watson, and Thomas Goldwell, E. 53 G. 3.* Page 255

CERTIORARI.

1. A certiorari to remove an order of sessions confirming an order of removal by two justices, must be moved for within six calendar months after such order of sessions made, and six days notice of such motion must be given to the justices pursuant to 13 G. 2. c. 18. s. 5., notwithstanding the order of sessions was made subject to the opinion of this Court on a case to be stated, which case was afterwards stated, and settled by the justices at the sessions. *The King v. The Justices of Suffex, T. 53 G. 3.* 631
2. A certiorari to remove an order of sessions confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, and not within six months after settling the case. *The King v. The Justices of Suffex, T. 53 G. 3.* 734

CHARTER-PARTY,

See ASSUMPSIT, 1.

The charterer of a ship from *L.* to *B.* and back, cannot plead to an action

brought against him by the owner on the charter-party for not providing a sufficient cargo at *B.*, that the ship sailed on the voyage from *L.* without convoy, contrary to the 43 G. 3. c. 57., and that the plaintiff was privy to and knew the same: it not being in the contemplation of the parties at the time of entering into the contract to violate the regulations of that act. *Wilson v. Foderingham, E. 53 G. 3.* Page 468

CLOTHIERS,

See MANDAMUS, 6.

COLLECTOR OF TAXES,

See DISTRESS, 1.

The 23 G. 3. c. 90. s. 4., for paving and lighting the parish of *St. Martin*, which prohibits under a penalty any person during the time *he shall be collector of any tax*, or hold any office of profit, or be interested in any contract or work to be done in the execution of that act, from acting as a committee-man under the act, does not extend to a collector of the assessed taxes. *Lee v. Birrell, E. 53 G. 3.* 482

CONTRACT,

See ASSUMPSIT,

Where a person performed work for a committee, under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right:" Held that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. *Taylor and Another, Assignees of Walsh, a Bankrupt, v. Brewer and Others, E. 53 G. 3.* 290

CON-

CONVOY,

See CHARTER-PARTY, 1.

CORPORATION,

See MANDAMUS, 2, 7. Quo Warranto.

COSTS.

1. The lien of the plaintiff's attorney upon the debt and costs recovered in the cause after affirmance upon a writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff: and costs in error are costs in the cause. *Middleton v. Hill and Another*, H. 53 G. 3. Page 240
2. The prosecutor of an indictment for obstructing a highway must shew himself to be the party grieved in order to obtain costs under the 5 & 6 W. & M. c. 11. s. 3.: therefore where the prosecutor did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and whilst it was stopped declared he did not care about it: Held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expence. *The King, on the Prosecution of Sir Arthur Chichester*, v. *Incledon*, E. 53 G. 3. 268
3. Where the plaintiff in assumpsit failed to prove his special counts, but upon the common counts recovered less than 5*l.* upon the balance of an account which contained items both on the debit and credit side: Held that by 59 & 40 G. 3. c. 104. he was deprived of costs, it appearing that the defendant resided and traded in *London*. *Fomin v. Osford and Another*, E. 53 G. 3. 393

4. The plaintiff in an action on the recognizance of bail, is not entitled to the costs up to the time of notice of render and staying proceedings if the bail render their principal within the eight days allowed by the rule of *Trin. 1 Anne*. *Cresswell v. Hern*, T. 53 G. 3. Page 742

COVENANT.

1. Where a lessee of a house and garden for term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the licence of the lessor," &c. and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises: Held that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants. *Doe on the demise of Bish v. Keeling*, H. 53 G. 3. 95
2. Where the plaintiff, *as executrix*, declared that the defendant, by deed, conveying to the plaintiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator that he was at the time of executing the deed seised in fee, and had a right to convey, &c.; and assigned for breach that the defendant was not seised, &c., and had not a right to convey, &c.: this was held ill upon special demurrer, and that the executrix could not maintain an action for such breaches of covenant, without shewing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Covenant upon request of the

the testator, his heirs or assigns, to make further assurance to the testator, his heirs and assigns, and breach assigned that the plaintiff, as executrix, requested the defendant to execute a release between the defendant, the plaintiff, and S. A., for farther assuring the premises to the uses mentioned in the deed, which the defendant refused; without shewing that the plaintiff claimed an interest, or to whose use the release was to enure, or why S. A. was a party to it; was considered ill on special demurrer. A demurrer for cause of misjoinder of breaches of covenant must be to the whole declaration, and not to the breach alone which is misjoined. *Eliz. Kingdon, Executrix, &c. v. Nottle, E. 53 G. 3.* Page 355

DEED,

See ASSUMPSIT, I.

DEFEASANCE,

See WARRANT OF ATTORNEY.

DEVISE.

1. Devise to the use of A. only surviving son of J. S., for life, and to his first and other sons, &c., and for default of such issue to the use of the first, second, and of all and every other son and sons of J. S. lawfully to be begotten, and the heirs male of the body of such first and other sons, with proviso that the said A. and his first and other sons, and also the first and other sons hereafter to be born of the said J. S. should reside at the family house, &c.: Held that the second son of J. S., born before the date of the will, should take upon the death of A. without issue. *Doe on the several demises of William and Thomas James, otherwise Morgan v. Hallett, H. 53 G. 3.* 124

2. Devise of "all that my farm called *Troques-farm*, now in the occupation of A. C." is not necessarily limited to the lands of *Troques* farm in the occupation of A. C., but may be shewn by evidence to extend to other lands of *Troques* farm not in his occupation. *Goodtitle, on the demise of Radford, v. Southern, E. 53 G. 3.* Page 290

3. Devise of all the testator's freehold estates to J. S. for life, and on his decease to and among his children equally, at the age of 21, and their heirs, as tenants in common; but if only one child shall live to attain such age, to such child and his or her heirs, at his or her age of 21; and in case J. S. shall die without issue, or such issue shall die before 21, then over: Held that the children of J. S. took a vested remainder. *Doe, on the several and joint demises of John Henry Roake, Thomas William Roake, George Roake, and Elizabeth Roake, v. Nowell, E. 53 G. 3.* 327

4. Devise to the three sisters of the testator for and during their joint natural lives, and the natural life of the survivor, to take as tenants in common and not as joint tenants; Remainder to trustees during the respective lives of the sisters and the life of the survivor, to preserve contingent remainders; and from and after their respective deceases and the decease of the survivor remainder over: Held that the sisters either took the estate as joint-tenants to be regulated in its enjoyment as a tenancy in common, or as tenants in common with benefit of survivorship. *Doe, on the dem. of Sarah Porwell, v. Abey, E. 53 G. 3.* 428

5. Devise of testator's leasehold houses, held for a term renewable, to J. T. S. to his own use and benefit on his attaining 21, upon trust that his (the

- (the testator's) trustees should pay and perform rents and covenants, and renew the same from time to time, and for that purpose to make surrender, &c., and also to permit the trustees to receive the rents during the minority, the maintenance of the infant to be paid thereout, with liberty to *M. P.* to keep the houses during the minority paying rent to the trustees, &c.: Held that this was in effect a devise to the trustees during the minority, with a vested remainder to *J. T. S.* the infant; and that the interest of *M. P.* ceased on the decease of *J. T. S.* before 21. *Goodright on dem. of J. Revell, S. Revell, R. Cock, and of J. Steele v. Mary Parker and Others, T. 53 G. 3.* Page 692
6. Devise to the use of the testator's daughter for life, remainder to her first and other sons and daughters in tail, with like remainders to his niece, her sons and daughters severally and successively, and for default of such issue to such of the uses, for such of the intents, and subject to such limitations declared by the will of *T. V.* as shall be then existing undetermined or capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity, will then permit: Held that *T. S. V.* who would have taken a vested remainder in tail, and would have been tenant in tail in possession under the will of *T. V.* took no vested estate under the second will, during the life of the second testator's daughter. *Phillips and Another v. Deakin, T. 53 G. 3.* 744

DISTRESS,

See NOTICE, 1.

1. The collector of the house and window tax under 43 G. 3. c. 161.

may distrain for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed, and the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears. *Juson v. Dixon, T. 53 G. 3.*

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2. Where a sheriff's officer executed a writ of *fi. fa.* by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table and saying, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away, without leaving any person in possession, and after the *fi. fa.* was returnable, but not continued, the landlord distrained the goods for rent: Held that the sheriff could not maintain trespass against him. *Blades and Another v. Arundale, T. 53 G. 3.*

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DRUGS,

See ASSUMPSIT, 2.

ERROR, WRIT OF,

See BAIL, 2, 3, 4.—INDICTMENT, 1.
—PRACTICE, 3.

The clerk of the errors in *C. P.* in transcribing the record, by mistake entitled it generally instead of specially, and error was assigned thereon; after which he amended the transcript by inserting the special memorandum; the Court would not restore the transcript to the state in which it stood at the time when the plaintiff in error assigned his error. *Randole v. Bailey and Another: In error, H. 53 G. 3.*

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EVIDENCE,

See SLANDER, 1, 2. TROVER.

1. Where the plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, to which the defendant did not put in any answer, and the plaintiffs afterwards obtained an order of the Court for the examination of the witness, and gave notice thereof to the defendant, and of the interrogatories intended to be put, and on the same evening examined the witness, who left *London* the next day for a foreign country, and never returned; and the plaintiffs afterwards obtained a further order that the deposition of the witness should be published in order that it might be read in evidence at the trial: Held that the deposition was admissible evidence at the trial, for as the defendant had notice of the time of the examination, he might have cross-examined at that time, or applied for further time for that purpose; and it must be presumed from his not having done either, that he did not wish to cross-examine. *Cazenove and Another v. Vaughan*, H. 53 G. 3. Page 4
2. Upon a question whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to shew by parol evidence that there was a known distinction within the manor between *old* and *new land*, and that in fact the plaintiff's lands lay within the boundary of the *new land*; and also to shew by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under the plaintiff's lands was in the lord. *Barnes v. Mawson*, H. 53 G. 3. 77
3. Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone: Held that his declaration was evidence against all the partners, and therefore they could not sue jointly upon such a contract. *Lucas and Others v. De la Cour*, E. 53 G. 3. Page 249
4. Devise of "all that my farm called *Troques-farm*, now in the occupation of *A. C.*," is not necessarily limited to the lands of *Troques-farm* in the occupation of *A. C.*, but may be shewn by evidence to extend to other lands of *Troques-farm* not in his occupation. *Goodtitle, in the Demise of Radford, v. Southern*, E. 53 G. 3. 299
5. By the 51 G. 3. c. 60. (local act) the register book of the *Bristol Canal Company* is evidence, in an action brought by them for calls, of the defendant's being proprietor of the number of shares affixed to his name. *The Bristol and Taunton Canal Navigation Company v. Amos*, T. 53 G. 3. 549
6. The sheriff's return to a writ of *fi. fa.* that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment-creditor so as to charge the latter with the receipt of it, in an action for money had and received. *Cator, Assignee of Sparkes, Bankrupt, v. Stukes, Gent.*, T. 53 G. 3. 599
7. Upon appeal against an order of removal the declarations of a rated inhabitant of the appellant parish are evidence against that parish, without calling the inhabitant and shewing that he refused to be examined. *The King v. The Inhabitants of Whitley Lower*, T. 53 G. 3. 636
8. Trespass *quare clausum fregit*. Plea of prescriptive right of common over the locus in quo at all times for his cattle, levant and couchant;

couchant; replication prescribing in right of his messuage to use the locus in quo for tillage with corn, and until the taking in of the corn to hold and enjoy the same in every year, and traversed the defendant's prescription; on which issue joined: Held that many persons besides defendant having a right of common over the locus in quo, evidence of reputation as to the right claimed by plaintiff was admissible, a foundation being first laid by evidence of the enjoyment of such right; and that plaintiff's right might legally exist as a qualification of defendant's right, and was not repugnant to it. *Week v. A. Stawke, W. Sparke, and W. Sparke, Jun. T. 53 G. 3.* Page 679

EXECUTION,

See BAIL, I. RENT. SALE.

EXECUTOR,

See COVENANT, 2. PLEADING, 2.

Where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter: Held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. *Wighman v. Lawrence, Dickons, Thomas and James Watson, and Aram, E. 53 G. 3.* 412

FACTOR.

1. A factor cannot pledge the goods of his principal: therefore, where

goods were consigned from abroad to a factor to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor or his assigns, and the factor afterwards indorsed and delivered the bill of lading, together with the goods, to the defendants, as brokers, with instructions to do the needful, and the defendants made advances to him on the credit of those and other goods, without knowing that he was not the owner of them: Held that the defendants could not retain the goods against the consignor until payment of the debt due to them from the factor on account of these advances. *Martini v. Coles and Others, H. 53 G. 3.*

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2. Where sugars were shipped from abroad under a bill of lading, which expressed that they were on account of the plaintiffs, and were to be delivered to W. and their assigns, and W. who were the agents of the plaintiffs for the management of their property consigned from abroad, indorsed the bill of lading, together with the other bills of lading comprising the rest of the cargo, to the defendants, and drew bills upon them for the amount of the whole cargo, which the defendants accepted and paid, and sold the sugars at two months' credit, at the expiration of which they carried the amount of the proceeds to the account of W., who in the interval between the sale and the expiration of the credit had become bankrupts: Held that the plaintiffs were entitled to recover the proceeds of such sale from the defendants. *Shipleigh and Others v. Kymer and Others, E. 53 G. 3.* 484

FISHERY.

See IMPRESS. RATE, 4.

FRAUDS,

FRAUDS, STATUTE OF.

1. Where the defendant agreed *by a written contract* to purchase of the plaintiffs 300 hogs of bacon, to be delivered at fixed times and in specified quantities, and after a part of the bacon had been delivered, requested the plaintiffs, as the sale was full, not to press the delivery of the residue; to which the plaintiffs assented: this was to be understood only as a *parol* dispensation of the performance of the original contract, *in respect to the times of the delivery*, and therefore was not affected by the statute of frauds: the defendant was held liable for not accepting the residue within a reasonable time afterwards. *Cuff and Others v. Penn*, H. 53 G. 3. Page 21
2. The 29 Car. 2. c. 3., which requires a will of lands to be attested and subscribed in the presence of the deviser, means that he should be in a situation that he may see the witnesses attest: therefore where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that the testator was not in such a situation in the room that he might by so inclining have seen them: Held that the will was not duly attested. *Doe, on the Demise of Wright and Others, v. Mansfold and Another*, E. 53 G. 3. 294

FRAUDULENT CONTRACT,

See CARRIER.

FREIGHT,

See ASSUMPSIT, I. INSURANCE, 10, 11.

Where the consignees of a *West India* cargo, deliverable by bill of lading

to them or their assigns, he or they paying freight for the same, indorsed it to the defendants, their brokers, for advances made by them, and the cargo on its arrival was landed at the *West India* docks in the names of the consignees, but was entered at the custom-house by the defendants in their own names, and afterwards the defendants obtained delivery from the *West India* docks under an order from the consignees for that purpose, and not under the bill of lading: Held that the receipt of the cargo by the defendants under the order of the consignees was not a sufficient ground to raise an implied assumpsit on their part to pay the freight, and the entry at the custom-house made no difference; but as it appeared from previous dealings that the defendants had been in the habit of receiving goods in the same manner and paying the freight for them, that was considered sufficient to raise such an implied promise. The lien of the plaintiffs (the ship-owners) for freight continued after the landing of the cargo at the *West India* docks, although they did not give notice to the Company to retain the cargo until payment of the freight. *Wilson and Others v. Kymor, M'Taggart, and Others*, H. 53 G. 3. 157

GAMING.

Money fairly lost at play cannot be recovered back in an action of debt for money had and received not founded on the statute. *Thistlewood v. Cracroft and Darley*, E. 53 G. 3. 500

GUARANTIE.

A paper-writing was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone) to this effect;

effect: "I understand *A.* and Co. have given you an order for rigging, &c, I can assure you, from what I know of *A.*'s honor and probity, you will be perfectly safe in crediting them to that amount: indeed I have no objection to guaranty you against any loss from giving them this credit;" which paper was handed over by *A.* to the plaintiffs, together with a guarantie from another house, which they required in addition, and the goods were thereupon furnished: Held that the paper did not amount to a guarantie, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guarantie. *M'Iver and Another v. Richardson*, E. 53 G. 3. Page 557

HUSBAND AND WIFE.

Husband alone cannot be the petitioning creditor to support a commission of bankruptcy, in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife dum sola. *Rumsey, Assignee of Collins, a Bankrupt, v. George and Another*, H. 53 G. 3. 177

HUSTINGS.

By stat. 51 G. 3. c. 126., one of two candidates for the city of *Westminster* is only liable to the bailiff for a moiety of the expences of the buildings. *Morris v. Lord Cochrane*, E. 53 G. 3. 283

IMPRESS.

The 50 G. 3. c. 108. s. 2., which exempts certain persons, who shall be employed in the fisheries of these kingdoms, from being impressed, extends to a lobster fishery, carried on by British subjects upon the coast of
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Heligoland for the purpose of supplying the *London* market with that fish: and therefore the Court discharged a mariner and an apprentice who had been impressed out of one of the vessels engaged in that fishery. *Samuel Payne and John Thoroughgood's case*, H. 51 G. 3. Page 223

INDICTMENT,

See COSTS, 2.

1. Plea of *auter foits acquit*, which does not state the record of acquittal, is bad. On writ of error brought on a judgment of conviction for felony at the general quarter sessions, this Court will only look to the record of conviction, although the justices return also the record of a former acquittal. *The King v. Thomas Willey*, H. 53 G. 3. 183
2. Indictment charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought, it will be reversed. It seems that a count charging him by reason of being owner of a navigation under a private act of parliament, must set forth the act. *The King v. Matthias Kerrison*, E. 53 G. 3. 435

INFANT,

See NECESSARIES. PLEADING, 5.

INSURANCE,

See PARTNERS, 2. WITNESS, 1.

1. Where the plaintiffs effected a policy of assurance on wines, from *Oporto* to *London*, on the 12th of *November*, at which time they were in possession of two letters from their correspondents at *Oporto*; the first of which, dated 11th of *October*,
3 F

ber, stated thus ; “ *We are loading the wines on the Stag, Captain Wheatley, who pretends to sail after to-morrow ;*” the other, dated the 13th of *October*, inclosed the bills of lading, which were filled up “ *with convoy ;*” which letters the plaintiffs did not communicate to the underwriters : Held that it was a material concealment. *Bridges and Others v. Hunter, H. 53 G. 3.* Page 15

2. An assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship : for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond. *Thompson v. The Royal Exchange Assurance Company, H. 53 G. 3.* 30

3. Where the plaintiffs, on the 25th of *October*, effected an insurance on ship at and from her port of loading to her port of discharge, and it appeared that on the 25th of *July* preceding, the ship, whilst in her port of loading, was driven on a rock by a storm, but got off without appearing to have suffered material damage ; and the captain afterwards wrote a letter to the plaintiffs without communicating the accident ; which letter reached them on the 5th of *October* ; and the ship afterwards arrived at her port of discharge, where the captain made a protest, detailing the accident, and stating that the planks of her bottom must have been chafed, and her bottom otherwise injured, by striking on the rock : Held that the plaintiffs could not recover as for an average loss arising from the accident ; for the captain was bound to communicate the accident, and for want of such communication, the antecedent damage was an implied exception out of the policy : and

the policy not being made void, the plaintiffs could not recover back the premium. *Gladstone and Another v. King, H. 53 G. 3.* Page 35

4. Where a licence was granted to the plaintiff on the 25th of *May* 1810, to take a cargo from *London* to *Archangel*, and to return from thence with a cargo of grain and other goods permitted by law to be imported to any part of the United Kingdom, and the licence was limited to the 29th of *September* following, which time was afterwards extended to the 1st of *January* 1811, and the ship, after taking in a cargo of pitch and tar at *Archangel*, sailed on her homeward voyage on the 13th of *October* 1810, but was driven back to *Archangel*, and there unloaded, and her cargo sold, and the ship laid up for the winter, and did not sail again from thence with a cargo of wheat until the 1st of *August* 1811 : Held that the licence was not exhausted by taking in the first cargo of pitch and tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed, provided it appeared that the voyage was prosecuted with all reasonable dispatch, which was a question for the jury ; and therefore if it should so appear, an insurance effected by the plaintiff on the 18th of *August* 1811, on wheat at and from *Archangel* to *London*, would be valid, and would attach on the wheat cargo ; but an insurance on money advanced to the captain at *Archangel* was void, and upon that the plaintiff might recover back the premium. *Siffken v. Allnutt, H. 53 G. 3.* 39

5. Where goods were insured from *Heligoland* to *Memel*, with liberty to touch at any ports and to seek, join, and exchange convoy, warranted free from capture in the port of *Memel*, and the ship sailed from *Heligoland* with orders to go to *Gottenburgh*

- burgh* to know whether to proceed to *Anholt* or *Memel*, and was captured in her way to *Gottenburgh*, which is in the track either to *Anholt* or *Memel*: Held that this was to be considered as a voyage to *Memel*, although it was subject to be changed according to circumstances upon the ship's arrival at *Gottenburgh*; and therefore the risk commenced on her leaving *Heligoland*; and the ship never having reached *Gottenburgh*, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable. *Hesilton v. Allnutt*, *H. 53 G. 3.* Page 46
6. A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence that he was directed also to insure against *British* capture; for that is not a crime so as to render the whole insurance illegal, though it would be void pro tanto. *Glafer and Another v. Cowie and Another*, *H. 53 G. 3.* 52
7. Where the plaintiffs declared on a policy of assurance, and averred that they were the persons residing in *Great Britain* who received the order for and effected the insurance; this was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected, directing them to make assurance; although the policy was originally on goods on board the *Ann*, or ships, or by whatsoever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, signed by the defendant, declaring the interest to be on board the *Herald*, the ship mentioned in the letter. *Bell and others v. Janfon*, *H. 53 G. 3.* Page 201
8. A licence granted under an order in council to *H. S.* (a *British* resident merchant), permitting a vessel, bearing any flag except the *French*, to proceed in ballast from any port north of the *Scheldt* to *Archangel*, there to load a cargo of such goods as are permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to *H. S.*, or any particular class of persons: and therefore where *Russian* subjects at *Archangel*, who were alien enemies, had shipped goods under such licence for the purpose of being brought into this country, it was held that they were protected by it; and an insurance made for their benefit was legal. *Robinson and Others v. Touray*, *H. 53 G. 3.* 217
- S. P. Same v. Cheesewright*, *H. 53 G. 3.* 220
9. A mistake made by the agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. *ib.*
10. Where a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool* at the current rate of freight, to be paid at one month from the discharge of her cargo at *Liverpool*; and the ship owners effected a valued policy on the freight at and from *Jamaica* to her port of discharge in the United Kingdom; and the ship arrived at *Jamaica*, and after taking on board one half of her cargo, was lost by storm, the remainder of her cargo being on shore and ready to be shipped: Held that the assured were entitled

to recover as for a total loss. *Davidsen and Another v. Willacy, E. 53 G. 3.* Page 313

11. Action on a policy on ship at and from *London* to the *East Indies*, until her arrival at her port of discharge on the outward voyage. Loss by perils of the seas. Ship was chartered from *London* to the *East Indies*, there to deliver her outward cargo and return thence with a cargo for *England* into the *Thames*. and there make a true delivery, &c.; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at *London*, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton; the ship failed on the voyage insured, and in the course of her outward voyage incurred an average loss, but was repaired and afterwards performed her voyage, and the freight was received: Held that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution. *Williams v. The London Assurance Company, E. 53 G. 3.* 318

12. Where a policy of assurance was on goods at and from *Pernambuco* to *Maranham*, and from thence to *Liverpool*, beginning the adventure on the goods from the loading thereof, on board the ship *wheresoever*: Held that it would cover goods previously loaded at *Liverpool*, and which arrived at *P.*, but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from *P.* to *M.* *Gladstone and Another v. Clay, E. 53 G. 3.* 418

13. Though a state may be in the military possession of one of two belligerents, that will not constitute her subjects enemies to the other belligerent, if the sovereign power of the latter chooses to permit a

continuance of commerce with them; therefore where an insurance was effected on property, shipped in this country on account of persons who were domiciled at *Hamburg*, at a time when that country was in the possession of *French* troops, the senate continuing to exercise the powers of civil government in the same manner as before: Held that the assured were entitled to recover for a loss which happened in the course of a voyage permitted by his majesty's orders in council. *Hagedorn v. Bell, E. 53 G. 3.* Page 450

14. A licence to *J. H.* of *London*, merchant, on behalf of himself and other *British* or neutral merchants, to import a cargo from certain limits, within which an enemy's port is situate, in any vessel bearing any flag except the *French*, will protect a ship trading from that port, in which ship *J. H.* and an alien enemy are jointly interested; and therefore such interest was held insurable. *Hagedorn v. Reid, T. 53 G. 3.* 567

15. A natural-born subject of this country, domiciled in a foreign country in amity with this, may lawfully exercise the privileges of a subject of the country where he is domiciled to trade with another country in hostility with this; therefore where plaintiff, a *British*-born subject domiciled in *America*, effected a policy of assurance on ship, freight, and goods, at and from *Virginia* to any ports in the *Baltic*, and the ship was captured in her way to *Elseneur*, in *Denmark*, *Denmark* being in amity with *America*, but at war with this country: Held that the plaintiff was entitled to recover. *Bell v. Reid, T. 53 G. 3.* 726

INTEREST.

In an action of debt to recover a sum awarded to the plaintiffs by a jury under

under the 43 G. 3. c. 140., and 48 G. 3. c. 11., as a compensation to be made by the *Bristol* dock company for an injury done to the plaintiff's property by means of the works authorized by those acts: Held that the jury might give interest for the detention of the sum awarded. *Hilhouse and Others v. Davis, H.* 53 G. 3. Page 169

JUDGMENT,

See PLEADING, 2, 3, 4.

Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the term; the Court granted a rule to compute principal and interest on the bill on which the action was brought. *Berger v. Green, H.* 53 G. 3. 229

JUSTICES.

1. The Court will not grant a mandamus to the justices at sessions to rehear an appeal against an order of removal, after judgment given by them, and entered by the clerk of the peace for quashing the order; upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake, instead of an adjournment of the appeal. *The King v. The Justices of Leicestershire, E.* 53 G. 3. 442
2. The justices at sessions may alter their judgment during the continuance of the sessions. *ib.*

LANDLORD AND TENANT,

See LEASE.—MONEY HAD AND RECEIVED, 2.

The landlord of premises upon which the goods of his tenant are taken in execution can only claim from

the party suing the execution the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession. *Hopkins v. Knight, and Bassett and Another v. Knight, E.* 53 G. 3. Page 245

LATITAT.

The Court set aside a latitat directed to the sheriff of Middlesex for irregularity. *Price v. Jackson, E.* 53 G. 3. 442

LEASE.

Where a lease contained a proviso for re-entry in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey, &c. to any person whomsoever, for all or any part of the term, without the licence of the lessor in writing; and the defendant, without such licence, agreed with a person to enter into partnership with him, and that he should have the use of the back-chamber and some other parts of the premises *exclusively*, and of the rest jointly with the defendant, and accordingly let him into possession: Held that the lessor was entitled to re-enter. *Roe dem. Dingley v. Sales, E.* 53 G. 3. 297

LIBEL.

A member of the House of Commons may be convicted upon an indictment for a libel in publishing in a newspaper the report of a speech delivered by him in that House, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that

and other newspapers. *The King v. Creevey, Esq. M.P., E.* 53 G. 3. Page 273

LICENCE,

See INSURANCE, 4. 8. 14.

LIEN,

See ATTORNEY, 1, 2. — FACTOR, 1.
— FREIGHT, 1.

LOBSTER FISHERY,

See IMPRESS.

MANDAMUS,

See APPEAL, 1.

1. The Court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act of parliament, to proceed to an assessment, of the value of land taken by them for the purposes of their canal; and also of the recompence to be made for the damages thereby sustained; if the parties interested in the land do not make their application to the Court within a reasonable time after the land was taken by the company, especially if the parties have another remedy by ejectment. *The King v. The Stainforth and Keadby Canal Company, H.* 53 G. 3. 32
2. Where a charter of incorporation of H. 7., granted to the citizens and commonalty in these words: "Quod ipsi & successores sui in perpetuum singulis annis successivis 24 concives civitatis in aldermannos, necnon 40 alios cives ejusdem civitatis pro communi consilio civitatis illius eligere facere & creare possint;" and it appeared that in the year 1693, and the two following years, successive elections of the 40 common councilmen had been made, since which time the usage had been not to elect the aldermen or common councilmen annually; the

Court refused a mandamus, which was applied for in order to raise the question against the usage, whether the elections of those officers ought to be annual, there being another remedy open to the parties making this application. *The King v. The Mayor and Citizens of Chester, H.* 53 G. 3. Page 101

3. Where the weavers presented a petition to the justices at sessions, praying them to limit a rate of wages, according to the provisions of stat. 5 Eliz. c. 4. §. 15., and 1 Jac. 1. c. 6. §. 3., and the justices heard the petition and counsel in support of it, and after making inquiry and examining witnesses upon the subject, determined that they could not make any rate more beneficial to the weavers: this Court refused a mandamus to the justices to hear and determine, although they did not examine the witnesses tendered by the petitioners, nor any witnesses upon oath, or in open court. *The King v. The Justices of Cumberland, H.* 53 G. 3. 190
4. The Court will not grant a mandamus to the justices at sessions to re-hear an appeal against an order of removal, after judgment given by them, and entered by the clerk of the peace for quashing the order; upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake instead of an adjournment of the appeal. *The King v. The Justices of Leicestershire, E.* 53 G. 3. 442
5. The 16 G. 3. c. 30., which gives an appeal to the sessions against a conviction for deer-stealing, requires the person appealing to give six days notice; and if an appeal be entered without notice, the sessions have no authority to adjourn it to the next sessions: where the sessions did so adjourn the appeal, and at the next sessions it was dismissed for want

want of notice, the Court refused to grant a mandamus to the justices to re-hear it. *The King v. The Justices of Oxfordshire, E.* 53 G. 3.

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6. The 13 G. 1. c. 23. § 5, for settling "disputes between clothiers or makers of woollen goods, and weavers, or persons employed in such manufactures," does not relate to demands against clothiers by the owner of a scribbling and carding mill for work done by him for the clothiers in teasing, scribbling, carding, and stubbing the wool at his mill: therefore the Court refused a mandamus to two justices to hear and determine such demands. *The King v. T. P. Heywood Esq. and Another, T.* 53 G. 3.

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7. Where a charter of incorporation after ordaining who should be entitled to be burgesses, directed that they should make application for that purpose to the mayor and commonalty on a day certain in each year, and at no other time, and then make due and legal proof of their qualifications, and A. and B. claiming to be admitted burgesses, made application to the mayor and commonalty on the charter day, and offered to make due and legal proof of their qualifications, but their applications were not heard, nor their proofs received on account of the time having been spent in other business; the Court granted a mandamus to the mayor and commonalty to enter an adjournment to a subsequent day, and then to hold a meeting, and receive and examine such proofs, &c.: and a return to such mandamus that it was impossible for A. and B., before the expiration of the charter day, to make due and legal proof, &c., according to the intent of the charter, by reason of the day being consumed

in the necessary business of the borough, and that the mayor and commonalty were not authorized to hear such proof on any other than the charter day, &c., was held ill and quashed. *The King v. The Mayor, Burgesses, and Commonalty of Carmarthen, T.* 53 G. 3.

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MEMORIAL,

See ANNUITY.

MONEY HAD AND RECEIVED.

See BANKRUPT, 4. — GAMING.

1. The sheriff's return to a writ of fi. fa. that he has levied the money is not sufficient evidence to prove that he has paid it over to the judgment creditor so as to charge the latter with the receipt of it, in an action for money had and received. *Cator, Assignee of Sparkes, Bankrupt, v. Stokes, Gent., T.* 53 G. 3. 599
2. Where the tenant of premises, under a lease, and at a rent payable half-yearly, agreed to pay all taxes, except the landlord's property-tax, which the landlord agreed to allow, and the tenant agreed to lay out 20l. in repairs, which the landlord also agreed to allow, but afterwards distrained for half-a-year's rent, and sold to the whole amount, without allowing either for repairs or property-tax, which he knew the tenant had paid to the collector: Held that the tenant might recover, in respect of the property-tax, but not in respect of the repairs, in an action for money had and received against the landlord. *Graham v. Tate, T.* 53 G. 3. 609
3. Where the holder of a bill of exchange, who held it in trust for plaintiff, sued the drawer, and, pending that suit, became bankrupt,

rupt. and his assignees afterwards brought an action against the drawer in the bankrupt's name, in which action, the sheriff having been guilty of an escape on mesne process, the assignees recovered against the sheriff in an action for the escape, damages to the amount of the bill: Held that the plaintiff might maintain money had and received against the assignees for the damages so recovered, allowing to them the costs and expences. Dissentient Lord Ellenborough C. J. — *Randoll v. Bell and Another*, T. 53 G. 3. Page 714

MONTH.

The word month may mean lunar or calendar month, according to the intention of the contracting parties: therefore where upon a sale of land on the 24th of *January*, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, and the purchase to be completed on the 24th of *June*, making a period of precisely five calendar months from the date of the sale and conditions, the word months was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. The condition for delivery of the draft of the conveyance within three months, was not a condition precedent with respect to its delivery within the precise time. *Lang and Another, Assignees of Bazeley, a Bankrupt, v. Gale*, H. 53 G. 3.

NECESSARIES.

In an action for goods sold to an infant, the issue being *necessaries*, if any part of the articles proved to have been furnished to the defendant, may fall within the description of necessaries, the evidence ought to be left to the jury. *Maddox and Another v. Miller*, T. 53 G. 3. Page 738

NEW TRIAL,

See SET OFF, 3.

NOTICE,

See APPEAL, 1. — BILLS OF EXCHANGE, 3. 5. 6. — CARRIER, 1. MANDAMUS, 5. — PRACTICE, 4. 10.

The notice of appeal required by 13 G. 3. c. 78. s. 80. against a distress for non-payment of a highway rate, may be within six days after the levy, and need not be within six days after the granting the warrant of distress. The notice of appeal need not disclose the ground upon which the appellant objects to the regularity of the distress. *The King v. The Justices of Devon*, E. 53 G. 3. 411

OUTLAWRY,

See PRACTICE, 7. — SCIRE FACIAS.

PARLIAMENT,

See LIBEL.

PARTNERS,

See EVIDENCE, 3.

1. Where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter: Held that they were liable upon a bill

bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. *Wightman v. Townroe, Dickons, Thomas and James Watson, and Aram*, E. 53 G.3.

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2. Money advanced to S. by B., one of several partners, out of the partnership funds, on account of payments to be made on policies of assurance underwritten by S., on account of himself and B., in pursuance of a previous agreement between them to share the profits and loss on such policies, was held not proveable under the commission of S., who became bankrupt, by the surviving partners of B. *Ex parte John Bell and Others in the matter of Scott, Bankrupt*, T. 53 G. 3. 751

PLEADING.

1. If the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment: therefore where the plaintiff declared as reversioner of a yard and part of a wall which W. F. occupied as tenant to him, and that the defendant on, &c. and on divers days, &c. wrongfully placed on the said part of the wall quantities of bricks and mortar, &c., and thereby raised it to a

greater height than before, and placed pieces of timber, &c. on the said wall, overhanging the yard, per quod the plaintiff during all the time lost the use of the said part of the wall, and also by means of the timber, &c. overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and said part of wall have been injured, to the damage of the plaintiff, &c.; without stating that his reversion was prejudiced: the Court arrested the judgment. *Jackson v. Pefked*, H. 53 G. 3. Page 234

2. A judgment confessed by an executrix to a creditor of the testator as well for his own debt as in trust for the debts of many of the creditors cannot be pleaded in bar to an action brought against her by another creditor of the testator. *Tolputt v. Ann Wells, executrix of Wells deceased*, E. 53 G. 3. 395
3. Plea that M. recovered a judgment against defendant as executrix for 1990*l.* claimed to be due to him from the testator; rejoinder that the judgment was confessed to M. for that sum for his own debt and as trustee for the debts of many other creditors: Held that the rejoinder was a departure from the plea. *ib.*
4. *Quære*, if a plea of judgment recovered ought to state the cause of action. *ib.*
5. Replication to a plea of infancy, that defendant, since the making of the promises, attained 21, and that before the exhibiting of the bill he ratified and confirmed the promises, is good after verdict, though it omit to allege that he ratified and confirmed after he came of age. *Cohen v. Armstrong*, T. 53 G. 3. 724

POOR-RATE,

See RATE.

PRACTICE,

See AFFIDAVIT. BAIL, 3, 4.
JUDGMENT.

1. If plaintiffs sue out joint and bailable process against four defendants, they cannot declare against one separately, though the others are out of the jurisdiction of the Court. *Thompson and Another, Executors, &c. v. Cotter, Kellett, and two Others, H. 53 G. 3.* Page 55
2. In an affidavit to hold to bail, the plaintiff's clerk may state his place of abode to be the office where he is employed the greater part of the day; though at night he sleeps at another place. *Hastope v. Thorne, H. 53 G. 3.* 103
3. A writ of error in parliament may be non prossed without carrying over the transcript to the court of error. *Milborn v. Copeland, H. 53 G. 3.* 104
4. The *English* notice to appear at the foot of a writ of attachment must contain the date of the day of appearance in words at length, not figures. *Pinero, Gent. v. Hudson, H. 53 G. 3.* 119
5. A special capias issued upon an affidavit sworn at the bill of *Middlesex* office is irregular: but if the defendant be arrested under it, and put in special bail, he thereby waves the irregularity. *Dalton v. Barnes, H. 53 G. 3.* 230
6. The rule that a voluntary appearance shall be of none effect unless some process be sued out within 14 days after such appearance, cannot be taken advantage of by any but the defendant unless some particular fraud is alleged. *Mackreth v. Jackson, Ennicutrix, H. 25 G. 3.* 408. n.
7. The Court *upon motion* reversed the outlawry of the defendant in a civil suit upon his putting in bail in the alternative, to satisfy the condemnation money, or render the principal, and paying all costs, including costs, if any, in the court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money absolutely. *Graham and Another v. Grill, E. 53 G. 3.* Page 409
8. The Court set aside a latitat directed to the sheriff of *Middlesex* for irregularity. *Price v. Jackson, E. 53 G. 3.* 442
9. Judgment of non pros for not entering the issue, cannot be signed unless there be a rule to enter the issue of the same term in which such judgment is signed. *Lancaster v. Fraser, E. 53 G. 3.* 478
10. The defendant in a country cause is entitled to eight days' notice to plead, although he has appeared, and is resident about two miles from London. *Holland v. Cooke, T. 53 G. 3.* 566
11. The defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in this court on his acknowledging satisfaction for the amount upon a judgment obtained by him in *C. P.* against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment. *Simpson v. Hanley and Another, T. 53 G. 3.* 696
12. A copy of a bill filed against an attorney, partly printed and partly written, on one sheet of paper, stamped with a 4d. stamp, which contained several printed counts, with two of them struck out, and was otherwise obliterated, and exceeded 17 common law folios, was held to be irregular, as not being a copy written in the usual and accustomed manner, on which the duty of 4d. per

per sheet is imposed by stat. 48 G. 3, c. 149, sched. 2. And it appearing that the bill was framed in the same manner, with the same obligations, the Court also set that aside as being contrary to the practice of the court. *Hartop v. Jukes, Gent. One, &c., T. 53 G. 3.* Page 709

PROCESS.

If plaintiffs sue out joint and bailable process against four defendants, they cannot declare against one separately, though the others are out of the jurisdiction of the Court. *Thompson and Another, Executors, &c., v. Cotter, Kellett, and two Others, H. 53 G. 3.* 55

PROMOTIONS, Pages 564, 566

QUO WARRANTO.

Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor pursuant to charter: Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the sacrament within one year, were not thrown away so as to authorize the returning officer to return another candidate who was in a minority. *The King v. Bridge, H. 53 G. 3.* 76

RATE.

1. Land, of which the annual value is improved by a spring rising within it, may be rated to the poor at such improved value, although the owners of the land, who are also occupiers, do not receive any of the profits derived from the spring, nor does any part become due in the

parish where the land lies. *The King v. The Governor and Company of the New River, E. 53 G. 3.*

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2. The lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated to the poor, as occupiers of land, in the parish where the manor lies; none of them being resident in the parish. *The King v. The Baptist Mill Company, T. 53 G. 3.* 612

3. Where a company were empowered by act of parliament to lay under ground, through the streets of a town, main pipes for the conveyance of water, and the inhabitants with the company's consent to lay pipes communicating with such main pipes to their houses, paying to the company a rate for such privilege: Held that the company were rateable to the poor in the parish where the main pipes lay in respect of those pipes, and the rates paid thereon. *The King v. The Company of Proprietors of Rochdale Waterworks, T. 53 G. 3.* 634
4. The lessee of all those fishings of the halves and halvendoles, with the appurtenants to the halves due and accustomed within the river *Severn*, between certain limits within a manor bordering on the said river, and of all royal fishes taken between the said limits, put and wheel fishing excepted, under an annual rent, is liable to be rated to the poor for such fishery. *The King v. Ellis, T. 53 G. 3.* 652

REGISTRY,

See SHIP.

RENT.

The landlord of premises upon which the goods of his tenant are taken in execution can only claim from the

the party suing the execution the rent due at the time of taking the goods, and not that which accrues after the taking, and during the continuance of the sheriff in possession. *Hoskins v. Knight*, and *Bassett and Another v. Same*, E. 53 G. 3

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REWARD.

Where an advertisement respecting a stolen child promised a reward to the person who would give information where the child was, so as that he might be restored to his parents, and the plaintiff communicated to the defendant her suspicion where the child was, in order to put the matter into his hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of the defendant acting upon the plaintiff's communication: Held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it. *Fallick v. Barber*, H. 53 G. 3.

108

SALE,

See SALE OF GOODS.

If the sheriff sell a term under a writ of fi. fa. which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. *Doe, on the Demise of Emmett, v. Thorn*, E. 53 G. 3. 425

SALE OF GOODS.

Where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods,

and notice of such assignment was advertised in the newspaper, and the goods were afterwards sold by the trustees at public auction, and the plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some, but left the greater part in her possession: Held that such purchase by the plaintiff would protect the goods against a judgment afterwards obtained and execution levied by a creditor of the husband, who had notice of the assignment at the time; although the plaintiff permitted his mother to continue in possession; and therefore he was entitled to recover them from the sheriff. *Leonard v. Baker*, E. 53 G. 3.

Page 251

SCIRE FACIAS.

Where plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment: Held that he could not have a seire facias against his administrator; for notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant. *Fort and Others, Assignees, &c. v. Catharine Oliver, Administratrix, &c.* H. 53 G. 3.

242

SESSIONS,

See APPEAL, I. CERTIORARI, I, 2. MANDAMUS, 4, 5.

The justices at sessions may alter their judgment during the continuance of the sessions. *The King v. The Justices of Leicestershire*, E. 53 G. 3.

442

SET-OFF.

See ATTORNEY, I. PRACTICE, II.

Where a broker effected policies of assurance in the name of his principal

pal under a del credere commission: Held that he could not set off losses which happened on those policies in an action by the underwriter to recover premiums, although the losses claimed were total, and the broker had accounted for them with his principal. *Cumming v. Forester and Others*, E. 53 G. 3. Page 494

2. It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners, in trust for the rest, may be set off in an account current between them. *Grosse and Others, Assignees of Fox and Others, Bankrupts, v. Smith, Thompson, and Others*, E. 53 G. 3. 545

3. A broker, who pays to *A.* the price of goods sold by him for *A.* under a del credere commission, is entitled to set off the amount against the assignees of *B.*, for whom he bought the goods; and where the jury found a verdict disallowing such set-off, and it was doubtful on the evidence, whether the payment was made before disclosure of the name of *A.* to *B.*, the Court granted a new trial. *Morris and Others, Assignees of Smith and Others, Bankrupts, v. Cleasby*, T. 53 G. 3. 576

SETTLEMENT—by Apprenticeship,

See APPRENTICE.

Where *J. G.* was bound apprentice by indenture in 1764 in the township of *C.*, and upon the death of his master in 1769 was assigned by the widow by indorsement on the indenture, whereby *she acquitted and assigned over her apprentice J. G.* for all the remainder of his apprenticeship, and *J. G.* served under such assignment in the township of *K.*, which township for the last seven years had regularly relieved the family of *J. G.* whilst residing in another parish: Held that this was

evidence from which the sessions ought to have presumed, after such a distance of time, that the widow was executrix and capable of assigning the apprentice, and that *J. G.* had acquired a settlement in *K.*, and consequently that his son, who had gained no settlement for himself, was there settled; and the sessions having drawn a contrary conclusion, this Court quashed the order of sessions. *The King v. The Inhabitants of Barnsley*, E. 53 G. 3. Page 377

SETTLEMENT—by Certificate.

A parish certificate granted to *T. C.* and *J.* his wife, engaging to receive them, *their child or children born or to be born*, only extends to a son, born at the time of granting the certificate so long as he continues a part of his father's family; therefore where the son married, and resided with his family apart from his father, in the certified parish: Held that his apprentice gained a settlement by serving him in the said parish. *The King v. The Inhabitants of the Township of Thwaites*, T. 53 G. 3. 669

SETTLEMENT—by Estate.

1. Where the pauper purchased a messuage for 52*l.*, under an agreement that the vendor should allow 40*l.* of the purchase-money to remain upon mortgage, and such mortgage was accordingly made, and 12*l.* only paid by the pauper to the vendor, who kept the title-deeds in his hands, but the pauper took possession, and resided in it for some years, but was unable to pay the rest of the purchase-money, and afterwards agreed to sell it to *B.* for 60*l.*, who thereupon paid the 40*l.* to the original vendor, upon his delivering up to him the title-deeds, and the remaining 20*l.* to the pauper, on the execution of the conveyance

conveyance to him, at which time the pauper quitted the messuage, not having resided on it 40 days after the payment of the 40*l.* to the original vendor: Held that the pauper did not gain a settlement by residence on such estate. *The King v. The Inhabitants of Olney, E. 53 G. 3.* Page 387

2. Where a pauper, as freeman of a town, was entitled, during his residence there, together with the other freemen, to a stinted common of pasture on a neighbouring moor for his own cattle, and also to a right to cut peat for his own use, and get limestones, &c. on the moor, and to put his children to the town-school free of expence, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exercised the common of pasture, or had any cattle with which to exercise it: Held that these rights did not amount to such an estate as to make him irremovable. *The King v. The Inhabitants of the Township of Warkworth, E. 53 G. 3.* 473

SETTLEMENT — by Hiring and Service.

1. The 40 days residence necessary to confer a settlement by hiring and service, must be within the compass of a year. *The King v. The Inhabitants of Denham, H. 53 G. 3.* 221
2. Where the father of the pauper contracted with J. S. that his son should be with him, and should work with him for two years, and have what he got, and should allow 2*s.* per week out of his gains to J. S., viz. 1*s.* for teaching him the business of a frame-knitter, 9*d.* for the rent of a frame, and 3*d.* for the standing: Held that this was a contract of hiring and service, and

not an apprenticeship; and that the son's having served under it was evidence that he had adopted the contract made by his father; and therefore he was entitled to a settlement by such hiring and service. *The King v. The Inhabitants of Burbach, E. 53 G. 3.* Page 370

- . Hiring for a year at 13*s.* 6*d.* per week, and to be at liberty to be absent during the sheep-shearing season, but to find a fit man, at his own expence, to do his work during his absence, but his own wages to go on during the whole time, will not gain a settlement. *The King v. The Inhabitants of Arlington, T. 53 G. 3.* 622

SETTLEMENT — by a Tenement of 10*l.* a year.

- . Where the pauper having a freehold estate in the parish of A. which he had let for 50*s.* per annum, rented a tenement in the parish of B. of the value of eight guineas per annum, and resided there 40 days: Held that he did not gain a settlement in B.; as he could not be considered as the occupier of the freehold estate. *The King v. The Inhabitants of South Bemflect, H. 53 G. 3.* 154

- . Where a pauper rented separate tenements of the joint yearly value of 10*l.*, in the parishes of T. and R., and had a house in each, in one of which in R., his family resided, and he sometimes slept in one and sometimes in the other, and on the last night of his holding the tenement in R., having slept the preceding night in T., he came to R. to pack up his furniture and fetch back his family, and passed the night there, but did not sleep or go to bed, but was occupied in moving, and left the house with his family very early the next morning: Held that his settlement was at R. *The King v. The*

The Inhabitants of Ringwood, E.
53 G. 3. Page 381

3. The renting an acre of land at 8*l.*, from *Easter* to *October*, for planting potatoes, where the land had been previously dug by the landlord for that purpose, and would not have been let for more than half that price if it had not been dug, was considered as a tenement of the yearly value of 8*l.*, although the case stated that in a common way an acre of such land would not let for more than 2*l.* *ib.*
4. Renting the tolls of a bridge, vested by act of parliament in a company of proprietors who are declared a corporation, will confer a settlement, although the shares of the proprietors are made *personal* estate, and the renting is not stated to be by deed. *The King v. The Inhabitants of Bubwith, E. 53 G. 3. 514*
5. The 13 G. 3. c. 84. (General Turnpike Act), which prohibits persons from gaining a settlement by renting the tolls of turnpike roads, does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road. *ib.*

SHERIFF,

See MONEY HAD AND RECEIVED, 1.
SALE.

SHIP.

The purchaser of a ship which appears by the sentence of condemnation in the vice-admiralty court abroad to have been taken and condemned for being engaged in the slave trade, is not entitled to register such ship at the custom-house under the 26 G. 3. c. 60., as the owner of a ship taken and condemned as lawful prize, although he produce a certificate from the Judge of the court abroad certifying that the ship was condemned as lawful prize. *The King*

v. The Collector and Comptroller of the Customs in London, E. 53 G. 3.
Page 262

SLANDER.

1. In an action of slander, imputing a specific charge of unnatural practices to plaintiff, where the declaration contains the usual allegation of good fame, &c., the defendant may, upon cross examination, ask the plaintiff's witness whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, in order to diminish the damages. — *v. Moor, E. 53 G. 3. 284*
2. Where the plaintiff declared that he had been a woollapler at *Cirencester*, and was a brewer at *Oxford*, and that defendant spoke of him as such trader these words: "Mr. H. (the plaintiff) and B. have both been bankrupts, Mr. H. at *Cirencester*," and gave no evidence of his having been a woollapler, but only that he was a brewer at *Oxford*, and proved the words spoken to have been these, He was a bankrupt at *Cirencester*, &c. Held that this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at *Oxford* may be a bankrupt at *Cirencester*. *Hall v. Smith, E. 53 G. 3. 287*

SLANDER OF TITLE,

See TITLE, SLANDER OF.

STAMP,

See APPRENTICE. BILLS OF EXCHANGE, 2. PRACTICE, 12.

1. In an indenture of apprenticeship a covenant by the apprentice to allow his master 2*s* per week, and to have wages and provide for himself during the term, does not require the additional stamp required by

by 44 G. 3. c. 98. upon an indenture where a sum of money is contracted for with the apprentice. *The King v. The Inhabitants of the Township of Bradford, H. 53 G. 3.*

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2. A mistake made by the agent in declaring the interest in the margin of the policy to be on a ship by a wrong name may be rectified by inserting the true name, without a fresh stamp. *Robinson and Others v. Touray, H. 53 G. 3.* 217

STATUTES.

Hen. VIII.

28. c. 11. f. 2. First-fruits. 213

Edw. VI.

- 2 & 3. c. 13. Tithes. 66

Eliz.

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James I.

1. c. 6. f. 3. Wages. 190
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21. c. 19. f. 11. Bankrupt. 335

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Will. & M.

- 3 & 4. c. 11. f. 3. 7. Settlement. 222
5 & 6. c. 11. f. 3. Costs. 268
8 & 9. c. 30. f. 1. Settlement. 674
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8. c. 14. Rent. 246

George I.

13. c. 23. f. 5. Clothiers. 624

Geo. II.

5. c. 30. f. 9. Bankrupt. 182

George II.

6. c. 31. Bastards. 210
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Geo. III.

13. c. 78. f. 80. Highway. 411
c. 84. Turnpike act. 514
16. c. 30. Deer stealing. 446
23. c. 90. f. 4. Collector of Taxes. Committee-man. 482
26. c. 60. Ship registry. 262
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39 & 40. c. 104. Coals. 393
42. c. 38. Brewing. 595
43. c. 57. Convoy. 468
c. 99. f. 33. Distress. 606
c. 140. Bristol harbour. 169
c. 161. Taxes. 601
44. c. 98. Stamp. 151
48. c. 11. Bristol port. 169
c. 149 sched. 2. Duty. 709
50. c. 108. f. 2. Impress. 223
51. c. 60. Bristol Canal Company. 569
c. 87. Brewing. 595
c. 126. Hustings. 283

TAXES;

See COLLECTOR OF TAXES.

The collector of the house and window tax under 43 G. 3. c. 161. may distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed, and the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears. *Juson v. Dixon, T. 53 G. 3.* 601

TITHES,

See WITNESS, 3.

In an action on the stat. 2 & 3 Ed. 6. c. 13., for not setting out the tithe of wheat, barley, oats, peas, and vetches, the jury found a custom throughout the parish for the parson to take the 11th shock of wheat, and the 11th cock of barley, &c.: Held

Held, that there was a sufficient consideration for the custom as to the wheat, it appearing that the farmer had always been used to put the sheaves into shocks, and in case of bad weather to open them to dry, and therefore the custom was good: but as to the barley, &c., there was no sufficient consideration, it appearing that the farmer only put them into cocks without doing any thing farther, except that in case of wet weather, before the parson tithed them, he opened the cocks of barley and oats, and put them up again, which was in fact for his own benefit: the custom therefore as to the barley, oats, peas, and vetches was held void. *Smyth, Clerk, v. Sambrook, H. 53 G. 3.* Page 66

TITLE, SLANDER OF.

. Where the declaration stated that the plaintiff was lawfully possessed of mines and ore gotten and to be gotten from them, and was in treaty for the sale of the ore, and that the defendant published a malicious, injurious, and unlawful advertisement cautioning persons against purchasing the ore, &c., per quod he was prevented from selling; to which the defendant pleaded in justification that the adventurers of, or persons having an interest or shares in the mines, thought it their duty to caution persons against purchasing the ore, &c. (pursuing the words of the advertisement); this plea was held ill on special demurrer; 1st, because it did not disclose the names of the adventurers, or who they were; and 2dly, because it did not shew that the defendant, in publishing the advertisement, acted under the direction of the adventurers. The allegation by plaintiff that he was law

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fully possessed of the mines and ore, seems a sufficient allegation of title, unless specially demurred to. The allegation that the defendant published a malicious, injurious, and unlawful advertisement, seems good without the word false. *Rowe v. Roach. Same v. Hoar the Younger, E. 53 G. 3.* Page 304

2. In an action for slander of title conveyed in a letter, to a person about to purchase the estate of plaintiff, imputing insanity to T., from whom the plaintiff purchased it, and that the title would therefore be disputed, per quod the person refused to complete the purchase: Held that the defendant, who had married the sister of T., who was heir at law to her brother, in the event of his dying without issue, was not to be considered as a mere stranger; and that the question for the jury was not whether they were satisfied as men of good sense and good understanding that T. was insane, or that the defendant entertained a persuasion that he was insane upon such grounds as would have persuaded a man of sound sense and knowledge of business, but whether he acted bonâ fide in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget. *Pitt v. Donovan, T. 53 G. 3.* 639

TOLLS,

See SETTLEMENT BY TENEMENT,
4, 5.

TRESPASS,

See DISTRESS, 2.

TROVER.

In trover against several defendants, all cannot be found guilty on the same
3 G

same count, without proof of a joint conversion by all; therefore where plaintiff brought trover for goods against *A.* and *B.* bankrupts, and *C.* and *D.* their assignees, and proved that the bankrupts, before the bankruptcy, received and afterwards disposed of the goods by way of pledge, having no authority so to do; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand, and the jury found all the defendants guilty, there being only one count in the declaration: Held that the evidence did not warrant such finding. *Nicoll v. Glennie and four Others, and G. Sharpe, W. Sharpe, and G. Sharpe, the Younger, T. 53 G. 3.* Page 588

TURNPIKE ACT,

See SETTLEMENT BY A TENEMENT OF 10l. A-YEAR, 5.

USURY.

An indenture assigning to the plaintiffs a contract for the purchase of timber, upon certain trusts for securing to themselves out of the proceeds the re-payment of the purchase-money advanced by them, and also of a certain balance before due to them, together with interest thereon at 5l. per cent. up to the time of payment, and also the further sum of 200l. as and for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expences which they might be put to on account of the premises, is not usurious upon the face of it; for the 200l. allowed for trouble is not necessarily to be intended as a colourable reservation of further interest beyond the legal interest, but as a compensation for trouble not comprehended within

the words, costs, charges, damages, and expences; neither is it so excessive as to be intended as usurious on that account. *Palmer and Wilkins v. Baker, H. 53 G. 3.* Page 56

VENDOR AND VENDEE,

See SALE.

WARRANT OF ATTORNEY.

Where defendants gave a warrant of attorney to secure a sum certain to be paid half-yearly by instalments, with interest, on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, but no execution to be issued till default made in payment of the said sum, with interest as aforesaid, by instalments, and in the manner hereinbefore mentioned: Held that the plaintiff might take out execution for the whole on default in payment of the first instalment. *Leveridge v. Forty and Another, T. 53 G. 3.* 706

WEAVERS,

See MANDAMUS, 3.

WESTMINSTER, CITY OF,

See HUSTINGS.

WILL.

The 29 Car. 2. c. 3., which requires a will of lands to be attested and subscribed in the presence of the devisor, means that he should be in a situation that he may see the witnesses attest: therefore where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of testator's room a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that the testator

was not in such a situation in the room that he might by so inclining have seen them: Held that the will was not duly attested. *Doe, on the demise of Wright and Others, v. Manifold and Another, E. 53 G. 3.* Page 294

WITNESS,

See WILL.

The first and second underwriters upon a policy of assurance, who have paid the loss upon an undertaking made to them by the assured to repay the money in case they failed in an action brought by them against a subsequent underwriter, seem not to be competent witnesses for the defendant in that action, to prove that one of the assured when he effected the policy, misrepresented to them that it was a summer instead of a winter risk: but if on the first trial of that action, it does not appear whether the undertaking was made to the witnesses at the time they paid the loss or afterwards, and after the action was commenced, this Court will send the case down to a second trial in order to ascertain that fact. *Forrester and Others v. Pigou, H. 53 G. 3.* 9

2. In an action of slander, imputing a specific charge of unnatural practices to the plaintiff, where the declaration contains the usual allegation of good fame, &c., the defendant may, upon cross-examination, ask the plaintiff's witness whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, in order to diminish the damages. — *v. Moor, E. 53 G. 3.* Page 284

3. Action against the defendant, occupier of a farm in the township of *Down Holland*, for not setting out tithes. Defence, a farm modus; and the plaintiff shewed by surveys and terriers that no modus within the township was mentioned in them; against which the defendant proved by witnesses an uniform payment of a sum certain in respect of his tenement for upwards of 50 years: Held that the plaintiff might on cross-examination ask those witnesses whether other tenements in *Down Holland* did not pay a similar sum *Blundell, Clerk, and Thompson v. Howard, E. 53 G. 3.* 292

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ERRATA.

- Page 11. n. (a), for 562 read 652.
12. n. (a), for 459 read 469.
54. line 20. after *attend* insert *to*.
137. line 7. for *the former will* read *this will*.
151. line 21. for *constanly* read *constantly*.
181. last line, for *Rule absolute* read *Rule discharged*.
183. marginal abstract, for *auterfoit* read *auterfoits*.
192. n. (a), for 15 read 14.
338. line 8. for *Postea to the Plaintiff* read *Postea to the Defendant*.
355. line 3. for *plaintiff* read *plaintiffs*.

THE Reporters of these Cases are sensible of the Difficulty of succeeding a Gentleman, the Merit of whose Exertions for a number of Years has established his Claim to the general Applause of the Profession, and left to them who follow him but a very remote Prospect of attaining to his Pretensions. They are fully sensible also of their own Insufficiency to meet this Difficulty, and under that Impression have felt many more Reasons for declining than for making the Attempt ; but with a Hope of being able in some Degree to continue to the Profession a faithful Memory of the most prominent Decisions of this High Court, they have been induced to undertake it. If they have at all succeeded in this Undertaking, so far will their Object be attained, and they be encouraged to go on with better Expectations* for the Future. In the Attempt, no doubt Imperfections, and perhaps Inaccuracies, will be discovered ; but the Profession will attribute them to their true Cause, and not to the Court which decided, or the Counsel who argued these Cases.

*Lincoln's Inn,
July 15th, 1813.*

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C A S E S

ARGUED AND DETERMINED

1813.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-Third Year of the Reign of GEORGE III.

REID *against* FRYATT.

Saturday,
Jan. 23d.

UPON a rule for setting aside an award, the only question was whether the time for making the award had been duly enlarged: as to which it appeared that the cause had been referred under a Judge's order, containing a proviso, that the arbitrator should make his award on or before the 13th of *September*, but if he should not be prepared then, the time to be enlarged, from time to time, as he might require, and a judge of the court might think reasonable and just. On the 12th of *September* the arbitrator made an indorsement on the order of reference, that he required the time to be enlarged to the first day of next *Michaelmas* term; and on

Where a cause was referred under a judge's order with a proviso that the arbitrator should make his award on or before a day certain; but if he should not be then prepared, that the time should be enlarged from time to time, as he might require, and a judge of the court might think reasonable and just: held that

the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the judge's order, granting such further time was not obtained until a day subsequent.

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the 26th a judge's order was obtained to that effect, and on the 30th the arbitrator made his award.

Park and Brougham, who shewed cause against the rule, contended that the time was duly enlarged by the indorsement made by the arbitrator on the day preceding the expiration of the original time allowed for making the award; and that the judge's order subsequently obtained, being in the nature only of a confirmation of the act done by the arbitrator, related back to the date of the indorsement.

The Solicitor-General, in support of the rule, maintained that the terms of the order of reference required that both the act to be done by the arbitrator and the judge's order should precede any enlargement of the time, and that consequently the original time had elapsed before the enlargement could take effect.

LORD ELLENBOROUGH C. J. This is merely a question of grammatical construction on the terms of the order of reference; and upon that construction I own I have no doubt that the judge's order was in time, and that it is not necessary it should have been obtained within the time limited to the arbitrator for making his award. The words of the proviso are "that he shall make his award on or before the 13th of *September*"; the arbitrator therefore had the whole of the 13th given him for that purpose, with power to enlarge the time if he required it: but if any part of that day is to be subtracted for applying for a judge's order for enlarging the time for making his award, then he would not have all the time allowed him for that purpose by the terms of

of

of the reference. Perhaps then it might be a nice question whether the arbitrator might not have enlarged the time immediately after the expiration of the original period allowed him, but it is enough that he might have done so at the very last moment of that period; and it follows from thence that the judge's order may be subsequent to it, and if once the precise point of time may be passed, then it becomes a question for the judge's discretion. The power of enlarging is placed in the arbitrator, but that power is to receive a subsequent ratification from the judge to give it effect; which has been done in this case: and the judge according to the language of the order has thought it reasonable and just that the time should be so enlarged. This seems to answer the intent of such a provision, which it does not occur to me had any other material purpose than that of authenticating the act of enlargement required by the arbitrator.

The rest of the Court agreed; and *Le Blanc J.* added that this term ought never to be inserted in orders of reference; but that it should be left to the discretion of the arbitrator alone to enlarge the time as he might require.

Rule discharged.

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CAZENOVE and Another against VAUGHAN.

Where the plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, to which the defendant did not put in any answer, and the plaintiffs afterwards obtained an order of the Court for the examination of the witness, and gave notice thereof to the defendant, and of the interrogatories intended to be put, and on the same evening examined the witness, who left London the next day for a foreign country, and never returned; and the plaintiffs afterwards obtained a further order that the deposition of the witness should be published in order that it might be read in evidence at the trial: held that the deposition was admissible evidence at the trial, for as the defendant had notice of the time of the examination, he might have cross-examined at that time, or applied for further time for that purpose; and it must be presumed from his not having done either, that he did not wish to cross-examine.

PARK in the last term obtained a rule nisi for entering a nonsuit in this action, which was upon a policy of assurance, (in which the plaintiffs had recovered a verdict before Lord *Ellenborough* C. J. at the London sittings,) upon an objection made to the admissibility of the deposition of one *Lewis Plitt*, which had been received in evidence for the plaintiffs; respecting which it appeared by his Lordship's report, that the plaintiffs, after the commencement of this action on the 5th of *May* last filed a bill in the Court of Chancery against the defendant, for a commission to examine witnesses abroad, and for the examination of the said *Plitt de bene esse*, to which the defendant did not put in any answer; on the 15th of *May* the plaintiffs obtained an order of the Court for the examination of *Plitt de bene esse*, and gave regular notice thereof to the defendant, and served him with a copy of the interrogatories in chief; and the witness was examined on the evening of that day; at which time no cross-interrogatories were filed, nor did any one on the part of the defendant attend such examination. On the 25th of *June* following the plaintiffs obtained a further order for publication, which after reciting that it was prayed that the depositions of *Plitt*, taken *de bene esse* in the cause, under the order of that Court might be published, in order that the same might be read as evidence for the plaintiffs at the

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trial of this and other actions mentioned in the bill; the order then proceeded thus, "Whereupon and upon hearing counsel for the defendant, this Court doth order that the depositions of *L. Plitt* in this cause be forthwith published." On the day after his examination *Plitt*, who was a foreigner, left *London* for the coast, from whence he embarked in a few days for *Sweden*, where he still remains.

The Solicitor-General and *Scarlett*, who now shewed cause, after stating that the reading of the deposition was opposed at the trial on the general rule, that depositions before an answer put in are not admitted to be read, agreed to that rule, but contended that it was subject to the following exceptions; viz. unless the defendant appear to be in contempt, or has had liberty to cross-examine; and that his declining to cross-examine will not vary the exception. The necessity of such qualifications of the rule is apparent, for otherwise it would be in the power of any defendant, by his obstinacy in refusing to answer, or cross-examine the witnesses, to deprive the adverse party of the benefit of their testimony. Here it appears that the defendant had due notice of the interrogatories proposed to be put to the witness, and it was his fault that he did not put cross-interrogatories; he cannot therefore be permitted afterwards to avail himself of his own neglect.

Park, (with *Richardson* and *Newnham*,) contra, admitting the exceptions, contended nevertheless that the general rule ought to prevail, unless the defendant is clearly brought within one of the exceptions; and that the party who claims to read the deposition is bound

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to shew the adverse party either in contempt, or that he has had liberty to cross-examine according to the practice of the court, and has neglected it. Here it is plain the defendant was not in contempt, and it does not appear that according to the practice of the Court of Chancery, he had liberty to cross-examine; for the order for examination was only made on the 15th of *May*, and on the same evening the witness was examined, and left *London* the next morning. The presumption therefore is, that the defendant had no time to prepare and file his cross-interrogatories according to the practice of the court.

LORD ELLENBOROUGH C. J. Perhaps it may be as well to state what the rule of the common law is upon this subject, which puts an end to the question. The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete. But if the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined; otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not; which would be a most uncertain and unjust rule. Here then the question is whether the defendant had an opportunity of cross-examining. Now it appears that the plaintiffs filed their bill for the express purpose of examining the witness; and when they obtained the order for his examination, gave the defendant a regular notice of it,

and of the interrogatories intended to be put to the witness. But it is said that the defendant had no time to file cross-interrogatories, and therefore the notice was of no use: yet if he had intimated a wish to cross-examine, and addressed himself to the Court praying for further time for that purpose, there can be no doubt but that he might have obtained it: but he contents himself simply with paying no attention to the notice. Then comes the order for publication, which is obtained, as it appears, from the terms of the order after hearing counsel on the part of the defendant, who therefore had an opportunity of shewing cause against it. The order for publication recites, "that it was prayed that the depositions of the witness may be published in order that the same may be read as evidence for the plaintiffs at the trial," and directs as follows: "Whereupon this Court doth order that the depositions be forthwith published." The order therefore purports in its mandatory part, to act upon and adopt the purpose for which it is prayed in the reciting part; *i. e.* the special purpose of having the deposition read in evidence at the trial; for it is not limited by the judge who directed it, to any object short of that for which it was prayed. I must conclude then that the judge was satisfied before he directed such order to be made, that the adverse party had all the liberty to cross-examine which the practice of that court requires; and upon the principle of the common law I have already stated that there is no objection.

GROSE J. concurred.

LE BLANC J. The rule is that depositions are not allowed to be read before answer put in, or before the

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party is in contempt, unless he has had an opportunity of cross-examining; for if he has, and has omitted to avail himself of it, then it is his fault, and he cannot make that a ground for objecting to the depositions. In this case there was no evidence given at the trial to shew that the defendant had not liberty afforded him to cross-examine, or that he might not have exercised it; on the contrary, it appears that when the order for examination was made there was no objection interposed, nor further time prayed for. It must be presumed therefore that the defendant had an opportunity to cross-examine and chose to forego it.

BAYLEY J. I think it must be taken from the circumstances stated, that the defendant had liberty to cross-examine, and did not choose to exercise it; for when the interrogatories in chief were served upon him, he might have applied for time, had he been desirous of putting cross-interrogatories; and there was no proof at the trial that it was his intention to cross-examine.

Rule discharged (a).

(a) See *Gilb. Evid.* 4th edit. 62. 64. 4 *Mod.* 146. *Howard v. Tremaine.* *Hardr.* 315. *v. Browne*, *sembr. contrà*, 1 *P. Wms.* 414. *Copeland v. Stanton.* *Bull. N. P.* 6th edit. 240. *Com. Dig. Evid. C. 4.*

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FORRESTER and Others *against* PIGOU.*Monday,*
Jan. 25th.

ACTION on a policy of assurance, tried before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term. The defence was (inter alia) that at the time of effecting the policy, a misrepresentation had been made to the underwriters by one of the plaintiffs as to the nature of the risk, it being represented as a summer instead of a winter risk: to prove which the defendant called a witness of the name of *Noble*, who was the first underwriter upon the policy, and who stated upon the voir dire, "that he had paid the loss upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiffs promising to return the money in that event." Lord *Ellenborough* held that the witness was incompetent. The defendant then called another witness named *Gregory*, the second underwriter on the policy, who upon the voir dire stated "that he had paid the loss, but he had been since promised by one of the plaintiffs that he should be placed in the same situation with the other underwriters, if they did not settle." Upon this statement the Lord Chief Justice inclined against the admissibility of this witness, and he was also rejected. The jury found a verdict for the plaintiffs.

The first and second underwriters upon a policy of assurance, who have paid the loss upon an undertaking made to them by the assured to repay the money, in case they failed in an action brought by them against a subsequent underwriter, seem not to be competent witnesses for the defendant in that action, to prove that one of the assured when he effected the policy misrepresented to them that it was a summer instead of a winter risk: but if on the first trial of that action it do not appear whether the undertaking was made to the witnesses at the time they paid the loss or afterwards, and after the action was commenced, this court will send the case down to a second trial in order to ascertain that fact.

Park obtained a rule nisi in *Michaelmas* term for a new trial, on the ground taken in *Bent v. Baker* (a), as

(a) 3 T. R. 34.

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deduced from the case of *Barlow v. Voowell* (a), that an underwriter to whom a communication had been made by the assured respecting the particular risk insured, and in whose testimony therefore all the subsequent underwriters on that risk had acquired an interest, should not be permitted by an act done in concurrence with the assured, to disqualify himself as a witness, and deprive the underwriters of the benefit of his testimony.

The Solicitor General, Marryat, and Gaselee now shewed cause, and maintained that both the witnesses were incompetent, inasmuch as they had a direct interest in the cause. *Noble* had received an express undertaking at the time of payment; by virtue of which, if the plaintiffs did not recover in this action, he would be entitled to get back the whole of the money paid to them as the amount of the loss. The other witness indeed had not received an express undertaking at the time; but still he stood under the impression that the effect of his evidence, if it should succeed, would be to reimburse him in like manner; and if the plaintiffs had not succeeded, he might have sued on the subsequent promise made to him: and if either of the witnesses were to sue for repayment, the verdict in this action would be evidence for them to shew that the event had happened upon which the promise of repayment was made to them; and therefore this case falls immediately within the rule recognized in *Bent v. Baker*, for the witnesses are directly interested in the event of the suit. It may be admitted that a person who is in

(a) *Skin.* 586.

other respects a competent witness, cannot by any voluntary act of his own render himself incompetent, so as to divest the parties interested in his testimony of their right to his testimony, by laying a wager upon the event, unconnected with and collateral to the suit. The present case however is not like that; for this was not a wager but a payment made under a fair mercantile engagement, and was not unconnected with the subject of this action, but was paid in order to prevent a similar action from being brought against the witness. The case therefore is quite distinct from that of an idle wager. As to the case of *Barlow v. Vowell*, where Holt C. J. is said to have ruled that a person who made himself a party in interest after a plaintiff or defendant *had an interest in his testimony, could not deprive them of the benefit of his testimony; as if he be witness of a wager, &c. and afterwards bet on the same matter: it appears from that case not only that the wager was perfectly idle, but also that the witness was in the same situation as the broker in the case of Bent v. Baker, having been selected as the witness of the original wager.* [Bayley J. There is a case in *Strange (a)*, which does not admit of that distinction, where the prosecutor of an indictment had laid a wager that he should convict the defendant, and yet he was holden to be a competent witness for the crown.] There the public interest in having his testimony in a criminal proceeding was paramount.

Park and Topping contra. In *Bent v. Baker (b)* this question was fully discussed; and in *Smith v. Prager (c)*

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(a) *R v. Fox*, 562.
 (c) 7 *T. R.* 60.

(b) 3 *T. R.* 27.

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Lord Kenyon referring to that case said, “that the rule there laid down was, that no objection could be made to the competency of a witness on the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest.” Taking then that as the rule, it may be asked in this case how the witness was interested in the event of the suit. It is quite clear that this verdict would not avail him in any action brought against the plaintiffs to recover back the money paid, for he paid it with full knowledge of the circumstances; and according to the case of *Bilbie v. Lumley* (a), an underwriter who has paid a loss with full knowledge of all the circumstances, cannot recover the money back. [*Bayley* J. In that case there was not any promise to refund.] The promise would make no difference if there never was a liability. At all events, the witness *Gregory* stands clear of any interest; there being no undertaking to him at any time; and as to *Noble*, he was not interested until after the action was brought; for he paid the loss without any condition, and the promise to repay it was subsequent to the action; therefore if this objection prevails, the plaintiffs by their own act after action brought will be allowed to defeat the interest which the defendant had in the testimony of the witness; and, at the same time, will secure to themselves success in the action. [*Lord Ellenborough* C. J. I think you overstate the case as to *Noble*. The witness said that he paid his subscription on the understanding that if the plaintiffs did not succeed, he should be repaid: the letter was

(a) 2 East, 459.

subsequent.] The letter was twelve months after the settlement of the loss, and was also subsequent to the commencement of the action. The communication made to Noble, the first underwriter on the policy, gave every subsequent underwriter an interest in his testimony. The plaintiffs knew that he and the other witnesses were the only persons capable of giving evidence for the defendant respecting that communication; it shall not be endured then that, pending the action, the plaintiffs shall so negotiate with the witnesses, as to deprive the defendant of their testimony.

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LORD ELLENBOROUGH C. J. There is a difference as to one of the witnesses, viz. *Gregory*; for it did not appear whether the undertaking was made to him at the time when he paid the loss. That fact I should wish to have better ascertained. The undertaking to *Noble* appears to have been at the time, although there was a subsequent confirmation of it by letter: but as to *Gregory*, the time does not appear. If then either of the witnesses was in a condition to be admitted, there ought to be a new trial. Whenever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification. It may depend upon the time and circumstances under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication made to him was virtually made to all the subsequent underwriters. But the question is of such magnitude, that if it should arise, I should direct it to be put on the record, in order
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that it might be submitted to the consideration of all the judges. In this case one of the assured, being the person who also effected the policy, the defendant ex necessitate is more thrown upon the testimony of the underwriters than in ordinary cases, where the policy is effected through the medium of a mere broker. It will be proper therefore that the case should undergo another consideration, in order to ascertain the time when the undertaking was made to *Gregory* in particular, and also to the other witness. In the case of *Barlow v. Vowell*, it certainly does appear, as has been suggested in the argument, that the witness was the original witness of the wager. It was a fraud therefore to deprive the party of the benefit of his testimony. So in *Bent v. Baker* the broker was the common agent and witness of both parties; and therefore his testimony was not to be taken from them. But if a person who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that is to be determined by the event of that suit, he becomes as much interested in the event as if he were a party to a consolidation rule.

Per Curiam,

Rule absolute.

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BRIDGES and Others *against* HUNTER.Monday,
Jan. 25th.

ACTION on a policy of assurance, dated the 12th of *November* 1808, on wines on board the *Stag*, at and from *Oporto* to *Liverpool* and *Lancaster*, at eight guineas per cent. premium to return four for convoy and arrival; which was tried before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term. The case rested principally upon admissions; by which it appeared that the ship was laden on the 11th and sailed on the 13th of *October* 1808, from *Oporto* to join convoy, but never came up with it, and was obliged to put into *Lisbon*; from whence she sailed about the 10th of *November*, and was afterwards lost by the perils of the seas. The convoy which she attempted to join arrived on the 30th of *October*; and on the 1st of *November* a list of ships that sailed with it was entered at *Lloyd's*, which did not include the ship in question. The following was one of the admissions read at the trial, "that it is to be taken that no communication was made to the defendant at the time of effecting the policy, of any letter or other information except what the policy contained; unless upon the trial the plaintiffs are enabled to prove that some communication was made." The defence was that the plaintiffs had made no communication to the defendant at the time when the policy was effected, of two material letters, written on the said 11th and 13th of *October*, from their correspondents at *Oporto*, both of which were received on the 31st of *October* by the plaintiffs, and then in their hands; and the first of those letters, dated the

Where the plaintiffs effected a policy of assurance on wines, from *Oporto* to *London* on the 12th of *November*, at which time they were in possession of two letters from their correspondents at *Oporto*; the first of which dated 11th of *October* stated thus; "We are loading the wines on the *Stag*, Captain *Wheatley*, who pretends to sail after to-morrow;" the other dated the 13th of *October* inclosed the bills of lading, which were filled up "with convoy;" which letters the plaintiffs did not communicate to the underwriters: held that it was a material concealment.

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11th of *October*, contained the following extract; “ We are loading the wines on the *Stag*, Captain *Wheatley*, who *pretends* to sail after to-morrow :” the other, of the 13th of *October*, inclosed the bills of lading, which were filled up with the words “ *with convoy.*” The defendant contended that if these letters had been communicated, he should have known from the ship’s not being included in the convoy-list at *Lloyd’s*, that she was a missing ship. Lord *Ellenborough* C. J. stated to the jury, that the question was whether a disclosure of these letters would probably have varied the judgment of the underwriter, so as to have induced him either to decline subscribing the policy, or to demand a higher premium; that if such might have been the consequence of a disclosure of them, they were material letters to be communicated. The jury found a verdict for the plaintiffs.

Taddy in the last term obtained a rule nisi for a new trial, renewing as an objection to the verdict, the ground of defence that was relied upon at the trial.

Park and *Parnter* now shewed cause, and contended, 1st, that the whole question having been left to the jury, they were at liberty under the circumstances to presume that the letters were communicated to the underwriter; for in the absence of all fraud, which was not imputed to the plaintiffs, the jury might infer that the usual enquiries and communications were made at the time of effecting the policy. [Lord *Ellenborough* C. J. observed that he did not leave the question to the jury, whether the letters were communicated to the underwriter, because the admission read at the trial precluded all such presumption without further proof.] They then con-

tended that the letters were not material, so as to render a communication of their contents to the underwriter necessary; for they amounted merely to matter of expectation: the expression in the first letter that the captain *pretends* to fail to-morrow, amounted to this only, that he expects to fail; and it was held in *Barber v. Fletcher* (a), that a representation that a ship was *expected* to fail, would not vitiate the policy though it afterwards turned out that she had failed long before. [*Bayley J.* In *Willes v. Glover* (b), a letter to this effect, "I think the captain will fail to-morrow," was considered as material.] The jury under the circumstances did not think this letter so.

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The Solicitor-General and *Taddy*, contra, maintained that there was no necessary inference arising from the ordinary course of business, to authorize the jury in presuming that the letters were communicated. It is as usual for an underwriter to subscribe a policy without making enquiry, as after enquiry made. Assuming then that there was no disclosure, it is clear that the letters contained intelligence, on which the defendant ought to have had an opportunity of exercising his judgment; and therefore they ought to have been disclosed: and though the jury may have found their verdict on the ground that the letters were not material, yet if the Court think otherwise, according to the case of *Willes v. Glover*, they will grant a new trial.

LORD ELLENBOROUGH C. J. Under the terms of the admission, we cannot presume that any communication

(a) *Doug.* 305.(b) 1 *N.R.* 14.

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took place between the parties beyond that disclosed by the terms of the policy, which contained the description of the voyage, and the amount of the subscription. Nor is it very unlikely that the underwriter should subscribe his name without making further enquiry; because he knows at the time that if any material fact be withheld, his subscription will not be obligatory upon him; but that the loss will ultimately fall on the party who has been guilty of the concealment: and therefore he enters into the contract in full confidence of having all circumstances disclosed to him, the concealment of which might be fatal to the interests of the assured. The only question then is, whether the letters of the 11th and 13th of *October* were material letters to have been disclosed to the underwriter; for although no fraud is imputed to the plaintiffs in withholding them, still that will not help them, provided they were bound to make the disclosure. Now the letter of the 11th would have made known to the defendant the captain's intended time of sailing; and from that of the 13th, inclosing the bill of lading, he would have learned facts which were certainly important; viz. that the ship's lading was completed on that day, and that she was to sail with convoy. The defendant then might have referred to the convoy-list at *Lloyd's*, and would have there found that the convoy had arrived without her, and from that circumstance must necessarily have inferred a disappointment in the original intention of the parties. Now if that was a circumstance which might have made the underwriter pause before he subscribed his name, or have induced him to demand a higher premium, it was very material that it should have been communicated to him. I do not observe that this was more than the ordinary premium for such

such risks ; if it had been higher, I should have thought it an important circumstance ; but as the case now stands, I cannot help thinking these letters were material. It was a question certainly for the jury, and was left to them as such ; but still if this Court has reason to think that they came to a wrong conclusion upon it, we may set it right, 'as was done in *Willes v. Glover*, by sending the case down to another enquiry.

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GROSE J. I am of the same opinion, and think that the letters were material, because a communication of their contents might have made the risk of the underwriter appear different from that which he conceived it to be in the absence of such communication, and at all events would have led him to make further enquiries. It is not the less a concealment because made without any view to fraud, if in effect it operates to the prejudice of the underwriters.

LE BLANC J. If the jury, in the conclusion which they drew from the evidence, inferred that more was communicated to the underwriter than was proved, it would be against the terms of one of the admissions made at the trial, and that alone would be a ground for setting aside their verdict. But without supposing that, and taking the question simply upon the materiality of the two letters, I believe it has always been considered that the time of the ship's sailing, if known to the assured, is a material fact to be communicated to the underwriter. Here the assured were in possession of a letter from their correspondents, stating that they were loading the wines aboard, and the captain would sail after to-morrow ; and of another letter also, inclosing

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the bills of lading, which professed that she was to sail with convoy. Can the Court then say, consistently with *what has hitherto been considered as the law, that this intelligence respecting the time and manner of the ship's sailing was immaterial.* I think it would be extraordinary to hold such a doctrine, especially in a case where it appears that if the intelligence had been communicated, the ship might have been known upon search by the underwriter to have been a missing ship. He would have been a little staggered at finding a convoy, which arrived on the 30th of *October*, did not include a ship which was to sail with convoy on the 13th.

BAYLEY J. No inference arises from the amount of the premium, that any disclosure which made the risk more than an ordinary one, was made to the underwriter; and if it had, a bill in equity might have been filed last term, which would have furnished the evidence of it. As to the materiality of the letters, there can be no doubt the underwriter would have learnt from them that the ship was to sail on the 13th of *October* with convoy, and that an interval had elapsed during which the convoy had arrived without her. In *Barber v. Fletcher*, it is clear that the representation of the broker to the underwriter as to the ship's expected time of sailing, could not have been made by him, as founded upon any letter written by a person who was on the spot where the ship was; and the underwriter did not inquire into the ground of the expectation: it might therefore perhaps be considered as immaterial.

Rule absolute (a).

(a) See 1 *Esq. Rep.* 373., *M'Andrew v. Bell*. Ibid. 407. *Webster v. Foster*.

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*CUFF and Others against PENN.**Monday,
Jan. 25th.*

IN an action of assumpsit for not accepting a quantity of bacon, the case was this: the plaintiffs having offered to sell the defendant 300 hogs of bacon, the defendant on the 10th of *April* 1807, wrote to the plaintiffs the following letter: “ Messrs. *Cuff, Dickinson, and Cuff*, I agree to accept your offer of 300 hogs of bacon, to be delivered at such times and in such quantities as mentioned beneath, at 6ys. per cwt., each parcel to be paid for at two months after delivery; viz.

“ *April* 20th - - 25 hogs.

May 10th - - 25

 20th - - 25

June 10th - - 50

 24th - - 50

July 14th - - 50

 24th - - 50

Aug. 10th - - 25

300

J. Penn.”

On the 21st of *April*, (and not on the 20th, as stipulated by the contract,) the first delivery was made; but it appeared that the defendant did not make any objection on that ground. After the third delivery, viz. on the 5th of *June*, the defendant wrote to the plaintiffs, informing them that he should want the next delivery of bacon as soon as it could be got ready. On the 10th of *June* the defendant attended at the plaintiffs' warehouse, and 84 sides were then weighed in his presence; and on the 2d of *July* he again called on the plaintiffs, and told them, as

Where the defendant agreed by a written contract to purchase of the plaintiffs 300 hogs of bacon, to be delivered at fixed times and in specified quantities, and after a part of the bacon had been delivered, requested the plaintiffs, as the sale was dull, not to press the delivery of the residue; to which the plaintiffs assented: this was to be understood only as a *partial* dispensation of the performance of the original contract, in respect to the times of the delivery, and therefore was not affected by the statute of frauds: the defendant was held liable for not accepting the residue within a reasonable time afterwards.

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the sale of bacon was very dull, he hoped that they would not press it on him; and they assured him they would not: 84 sides were weighed at this time; and a further quantity was weighed on the 10th of July. The plaintiffs having forborne to deliver any more bacon for some time, at length informed the defendant that he had exceeded a reasonable time, and requested him to name a time for delivery. This the defendant declined, observing that the sales were very dull. Similar applications having been afterwards made to the defendant without effect, the plaintiffs on the 28th September wrote to the defendant, informing him "that on the 30th instant the remainder of the bacon would be weighed at their warehouse, and that he might see it weighed if he thought proper; if not, they should weigh it off, and deliver it to him in the course of that day." After the receipt of this letter, the defendant called on the plaintiffs, and said there was no contract; to which they answered, that they had his hand-writing, and should insist on the contract; the defendant replied there was no use in sending the bacon, as he would not take it. On the 30th of September the remainder of the bacon was weighed and sent to the defendant's house, but he refused to receive it. In the first count of the declaration, the contract was stated according to the terms of the defendant's letter of the 10th of April; and the declaration then averred that the plaintiffs delivered a part of the bacon which was accepted and paid for by the defendant under the contract; and that the plaintiffs offered to deliver the residue; but the defendant would not accept the same. In the second count, after setting forth the contract of the 10th of April, it was averred that the plaintiffs had delivered a certain quantity of bacon, which was ac-

cepted

cepted by the defendant, and that the plaintiffs intended and were about to deliver the residue under the contract, but the defendant, on the 2d of *July* 1807, discharged the plaintiffs from such delivery, and requested them not to deliver any more bacon until further orders from the defendant, which the plaintiffs agreed to do; and thereupon in consideration of the premises, and also in consideration that the plaintiffs had agreed to deliver the residue of the bacon, according to such orders within a reasonable time, the defendant promised to give such orders, and accept the residue of the bacon within a reasonable time, and to pay for the same according to the terms of the original contract: that on the 30th *September* 1807 the plaintiffs offered to deliver the residue, which the defendant refused to accept. The third count was similar to the second, except that it stated that the defendant requested the plaintiffs to postpone the delivery of the residue of the bacon for a reasonable time.

At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term, it was objected on the part of the defendant that this was a written contract for the sale and purchase of goods, and could not be varied by parol; but if the subsequent parol agreement was to be considered, not as varying the written contract, but as substituting a new one in its place; then it was void by the statute of frauds, there being neither a part acceptance nor a part payment under it. But his Lordship was of opinion that this was a dispensation only with the performance of the original contract in respect of the delivery of the bacon at the stipulated times; and directed the jury to find a verdict for plaintiff,

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tiff, with liberty to the defendant to move to enter a nonsuit; a verdict was accordingly given for the plaintiffs upon the second and third counts; and *Marryat* in the last term obtained a rule nisi for entering a nonsuit.

The Solicitor-General, Park, and Larves now shewed cause, and contended that the statute of frauds (a) only required that the contract of sale should be in writing; not that the contract for delivery should be so; in this case there was a written contract of sale; and the postponement of the delivery was in the nature only of an enlargement of the time for performing it. In *Warren v. Stagg* (b), cited in *Littler v. Holland* (c), *Buller J.* held that an agreement to extend the time for the performance of a contract, was not a waiver but a continuation of the original contract; and it never occurred in that case that there was any necessity for written evidence of such agreement. Here the declaration contains counts on the original agreement, as well as on the agreement to postpone the delivery of the residue of the bacon; and even admitting that a delivery was necessary under this latter agreement to constitute a part acceptance within the terms of the statute, the weighing out the 84 fides amounted to a delivery: it would have been a good transfer of the property to the vendor in the ordinary case of sale and purchase; so that if a fire had happened afterwards, according to the authority of *Rugg v. Minett* (d), the loss would have fallen on the purchaser.

(a) 29 Car. 2. c. 3. s. 17.

(c) Ibid.

(b) 3 T. R. 591.

(d) 11 East, 210.

Marryat and Gurney contra. The second class of counts, upon which the verdict was taken, cannot be sustained under the statute of frauds. The original contract was an entire contract as to price, quantity, and the times of delivery; and parol evidence varying the original contract in any of these respects ought not to be received. It would be as dangerous in its consequences to allow parol terms to be engrafted upon a written contract, as to allow a parol contract to be enforced in the first instance. Parol evidence, offered for the purpose of connecting two written instruments not having an immediate or necessary reference to each other, has been refused (a), and the attempt in the present case goes one step further than that; for it is an attempt to connect by parol evidence a written and a parol contract. In *Powell v. Divett* (b), Bayley J. said, that “without a written contract the case would be within the statute of frauds; and the mischief would be the same, if parol evidence were let in to shew how much of the contract was good and how much bad.” The time of delivery in this case is as essential as the price or the quantity; for there is a greater demand for the article at one season than at another. Is it competent then to the party to vary the time by parol? This would let in all the inconveniences which were intended to be obviated by the statute of frauds. If new times may be substituted, so may new prices or new quantities. As to the case of *Warren v. Stagg*, no question was there made upon the statute of frauds; the only question was whether the contract proved was different from that laid in the decla-

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(a) *Boydell v. Drummond*, 11 East, 142.

(b) 15 East, 32.

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ration: and *Little v. Holland* is contrary. That indeed was an action of covenant; but Lord *Kenyon* there cited the case of an action between *Garrick* and *Barry*; where the Court held that articles of agreement, which did not appear to be under seal, could not be dispensed with by parol.

Lord ELLENBOROUGH C. J. I think this case has been argued very much on a misunderstanding of the statute of frauds, and the question has been embarrassed by confounding two subjects quite distinct in their nature; namely, the provisions of that statute, and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract. The principal design of the statute of frauds was that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase. But by the express provisions of that statute it is only necessary, in order to make a contract for the sale of goods binding upon the parties, that there should be either a note or memorandum of the bargain in writing; or if there be no writing, that there should be a part-payment by way of earnest, or a part-acceptance of the goods. In the present case there exist two indicia pointed out by the statute, viz. a contract for sale in writing, and a part-performance, so that not only the literal intention but the spirit also of the statute is satisfied. The objection then does not found itself upon a non-compliance with the provisions of that statute, but is more properly this; that an agreement once made in writing cannot be varied by parol. If this agreement had been varied by parol, I
should

should have thought, on the authority of *Meares v. Ansell* (a), that there would have been strong ground for the objection. But here what has been done is only in performance of the original contract. It is admitted that there was an agreed substitution of other days than those originally specified for its performance: still the contract remains. Suppose a delivery of live hogs instead of the bacon had been substituted and accepted, might not that have been given in evidence as accord and satisfaction. So here the parties have chosen to take a substituted performance. It is clear that neither of them in the outset thought it necessary to stand on the letter of the agreement; for the first delivery was to have taken place on the 20th of *April*, and was not made until the 21st, and yet no objection was then taken. Afterwards a new mode of delivery is substituted at the defendant's express request. I am of opinion therefore that neither has the statute of frauds been trenched upon; nor has any rule of law respecting parol evidence not being admissible to vary a written agreement been violated in this instance.

Per Curiam,

Rule discharged.

(a) 3 *Wils.* 275.

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Monday,
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ELFORD and Others *against* TEED.

A presentment of a bill of exchange at a banking-house after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer: and no inference is to be drawn from the circumstance of the bill being presented by a notary, that it had been before duly presented within banking hours.

ACTION by the plaintiffs as indorsees of a bill of exchange against the defendant as drawer, and upon the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term, the defence was that the bill had not been duly presented for payment; as to which it appeared that the bill was accepted payable at Messrs. *Hodfoll* and Co., who were bankers in *London*; and that on the day when it became due, a witness who was clerk to a notary, carried it to the banking-house of *Hodfoll* and Co., for presentment, between half-past six and seven o'clock in the evening; that he found the banking-house shut, and then went to the private house door, and there saw a female servant, who returned for answer, No orders. The jury, under the direction of his Lordship, found a verdict for the plaintiffs; and the defendant had liberty to move to enter a nonsuit, which rule was accordingly obtained by *Taddy* in the last term on the authority of *Parker v. Gordon* (a).

The Solicitor-General and *Marryat*, who now shewed cause, contended that the jury might have reasonably inferred, (as the case was, though they were not in a condition to prove it at the trial,) from the circumstance of the bill having been carried for presentment after banking hours by a notary's clerk, who was not the usual person to present bills in the first instance, that it had been before presented during banking hours;

(a) 7 *East*, 585.

and that the whole of those hours had been allowed the acceptor of the bill to discharge it, according to the universal practice of banking houses, at the expiration of which time the notary made his presentment. This distinction they said was not adverted to in *Parker v. Gordon*, which was decided on the ground of there having been no other presentment than that made by the notary.

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LORD ELLENBOROUGH C. J. said that there was no ground for the jury to presume that which was so easily capable of proof; and that the case of *Parker v. Gordon* was not distinguishable from the present, and that case was conformable with the doctrine which he had usually held. There was not any text-writer upon whose authority a presentment of a bill by a notary at a house of business after it was closed, could be sustained. It is laid down in *Marius (a)*, that it must be made during times of business, at such seasonable hours as a man is bound to attend, by analogy to the *horæ juridicæ* of the courts of justice.

The rest of the Court concurred.

Topping and *Taddy* for the defendant, prayed that a nonsuit might be entered: but the Court only made the rule absolute for a new trial on payment of costs by the plaintiffs, in order that they might have an opportunity of proving a prior presentment.

(a) *Marius*, 2nd Ed. 187.

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Tuesday,
Jan. 26th.

THOMSON *against* the ROYAL EXCHANGE Assurance Company.

An assured on bottomry cannot recover against the underwriter unless there has been an actual total loss of the ship: for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond.

THIS was an action on a policy of assurance on bottomry, at and from *St. Christopher* to *London*, tried before Lord *Ellenborough* C. J. in *London*, at the sittings after last *Michaelmas* term: when it appeared that the ship failed on the voyage insured; in the course of which she encountered such tempestuous weather as to become totally disabled, and to have narrowly escaped foundering at sea; but falling in with a king's ship, was taken in tow by her and brought into *Falmouth*. A survey was made of the ship's state at that place, and of the expences necessary for her repair, when it was found that they would amount to 3200*l.*; and that after their completion she would be worth only 2000*l.*: the owners therefore determined to break her up and sell her at *Falmouth*; and her hull was accordingly sold for 300*l.*, and her sails and stores for 400*l.*; her value at the period when she left *St. Christopher* having been 4000*l.* These circumstances it was contended amounted to an utter loss within the meaning of the condition of the bottomry bond: but Lord *Ellenborough* C. J. being of a different opinion directed a nonsuit to be entered.

Gurney now moved to set aside the nonsuit, contending that the circumstances proved at the trial should have been left to the jury, with a direction to find a total loss: it appearing from the survey made of the ship that she was neither capable of continuing her voyage, nor of remaining any longer in existence as a ship,

ship, without incurring expences which would greatly exceed her value; and from necessity she was broken up, while the voyage was yet incomplete: by which means the condition upon which the sum borrowed was made payable had failed, and therefore the insurer was liable.

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LORD ELLENBOROUGH C. J. This was not a question, whether such a loss had happened as in the case of an insurance on the ship, might have entitled the assured to abandon; but whether it was an utter loss within the true intent and meaning of the bottomry bond. The distinction between an insurance upon the one and the other is simple: in the former case if the voyage be lost, or not worth pursuing, or the ship be reduced to such a state that she cannot proceed without refitting, the expence of which would greatly exceed her value, the assured may abandon and claim as for a total loss; but in the latter case as nothing short of an actual total loss will discharge the borrower of money upon bottomry, so nothing less will render the insurer liable. Here the thing continued to exist as a ship, her hull and bottom remained, though perhaps in such a state as might make it prudent for the owners to dispose of her. I have had occasion at the cockpit to state this distinction as established law; that in the case of bottomry nothing short of a total destruction of the ship will constitute an utter loss; if it exists in specie, in the hands of the owner, it will prevent an utter loss.

Per Curiam,

Rule refused.

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Tuesday,
Jan. 26th.*The KING against The STAINFORTH and KEADBY
Canal Company.*

The Court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act of parliament, to proceed to an assessment, of the value of land taken by them for the purposes of their canal; and also of the recompence to be made for the damages thereby sustained; if the parties interested in the land do not make their application to the Court within a reasonable time after the land was taken by the company; especially if the parties have another remedy by ejectment.

HOLROD moved for a rule nisi for a mandamus to the defendants, directing them to call a meeting of the commissioners appointed by an act of parliament of the 33 G. 3. c. 117. (a), for making and maintaining a navigable canal from the river *Dunn* navigation cut to communicate with the river *Trent*, &c., in order that the said commissioners should issue a warrant to the sheriff of the county of *York*, to summon a jury pursuant to the said act, to assess the sum or sums of money, or annual rent, to be paid for the purchase of certain land late belonging to Lady *Irwin*, deceased, and now to the Marquis and Marchioness of *Hertford*, in right of the Marchioness, taken by the said company for the purposes of the said canal, and the recompence to be made for the damages that have been sustained thereby by the said Lady *Irwin* and the said Marquis and Marchioness.

(a) By certain provisions of the above act commissioners are appointed for settling differences between the canal company and the proprietors of lands who are empowered by writing to ascertain either by an annual rent or by a sum in gross the value of the purchase of the lands set out for making the canal, and also the recompence for damages sustained; and if the parties are dissatisfied with their determination to issue a warrant to the sheriff of the county where the lands lie, to summon a jury to assess such value or recompence; and it is provided also that upon payment or tender of such sum as the commissioners shall ascertain or the jury assess, the company may take possession of the lands; and that upon further recording the determination of the commissioners or the verdict of the jury at the sessions the land shall vest in the company, and that until such sum is paid or tendered the company shall not be empowered to enter.

*It appeared by the affidavits on which the rule was prayed, that in the year 1799 the canal company took the land in question, amounting to about seven or eight acres, of which Lady Irwin was then tenant for life, and the Marchioness of Hertford afterwards became so at her decease, and converted it to the purposes of their navigation. At that time they made a valuation of the land without giving any notice of it to Lady Irwin; nor did they make any tender of the money at which they valued it during her life, but in 1806 her agent attended at a meeting of the company, and delivered in his claim at the rate of 30*l.* per acre above their valuation. In 1807 Lady Irwin died, and in April 1810 the agent of the Marquis made various applications to the company, for settling the price due for the said land; to one of which, in July, he received for answer, that they would consider the claim and communicate the result; which they did shortly afterwards by inclosing an order, made at a general meeting, for tendering the price of the original valuation and interest thereon, and if it was refused, the company declared they would abide the legal consequences. This valuation was sworn to be very far short of the real value of the land.*

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Holroyd contended that in order to proceed to a due valuation, according to the act, it was necessary to have a meeting of the commissioners; and that such meeting could only be compelled by means of a mandamus, which was therefore the proper remedy in this case. He said, that it was true the company by taking possession of the land before a due assessment was made, and the sum assessed was paid or tendered by them, which by the act are made conditions precedent to their

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taking possession, had made themselves trespassers, and therefore ejectment would lie against them; but that would be an inconvenient remedy, which might oust the public of land that is now dedicated to their use.

Lord ELLENBOROUGH C. J. Why was not this application made earlier? the cause of complaint originated as far back as the year 1799; and there is nothing stated to the Court to account for the delay. Since that time, no doubt, changes have taken place in the company's property, and many of the shares have got into other hands who were no parties to this transaction. I therefore think that this application comes too late, and remember a case not very long ago, in which Lord *Sheffield* was concerned, where the Court refused to entertain a similar motion on account of the length of time that had been suffered to elapse. Here there is another remedy by ejectment, which, if pursued, may perhaps lead to some compromise.

GROSE J. It might be injurious to those who have become purchasers of this property since the year 1799, to grant this rule.

LE BLANC J. If we were to grant the rule it must be to make an estimate of what was the value of the land as long ago as 1799.

Per Curiam,

Rule.

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GLADSTONE and Another against KING.

Tuesday,
Jan. 26th.

THIS was an action on a policy of assurance made the 25th October 1811, on the ship *Richard*, lost or not lost, at and from the vessel's port of loading in *Jamaica*, to her port of discharge in the united kingdom. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, it appeared from the admissions, that on the 15th of *July* 1811 the ship arrived in *Manchineal* harbour, in *Jamaica*, for the purpose of taking in her cargo; of which circumstance the captain apprized the plaintiffs, (her owners,) by letter of that date; on the 25th, whilst the ship was lying in the harbour, a storm came on which drove her from her moorings, and she struck upon a rock, but by the exertion of the ship's company was got off again without appearing to have suffered any material damage. On the 5th of *August* the captain wrote home to the plaintiffs, but did not make any mention of this accident in his letter, which reached the plaintiffs on the 5th of *October* following. The ship having completed her loading, proceeded on her voyage, and arrived at the *West India* Docks on the 6th of *January* 1812, and afterwards discharged her cargo undamaged: and on the day of her arrival the captain made a protest, in which he detailed the accident that happened to her on the 25th of *July*, but added, that she prosecuted her voyage home without

Where the plaintiffs on 25th October 1811 effected an insurance on ship at and from her port of loading to her port of discharge, and it appeared that on the 25th of *July* preceding, the ship whilst in her port of loading was driven on a rock by a storm, but got off without appearing to have suffered material damage; and the captain afterwards wrote a letter to the plaintiffs without communicating the accident; which letter reached them on the 5th of *October*; and the ship afterwards arrived at her port of discharge, where the captain made a protest detailing the accident, and stating that the planks of her bottom must have been chafed, and

her bottom otherwise injured by striking on the rock: Held, that the plaintiffs could not recover as for an average loss arising from the accident; for the captain was bound to communicate the accident, and for want of such communication, the antecedent damage was an implied exception out of the policy: and the policy not being made void, the plaintiffs could not recover back the premium.

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exhibiting any bad effects from the accident ; although the planks of her bottom must have been chafed, and her bottom otherwise injured by striking on the said rocks. This was the first intimation given to the plaintiffs of the accident. A survey was afterwards made, when it was discovered that the ship, in consequence of having run aground, had sustained damage in her keel and other parts to the amount of about 15 per cent., which damage the plaintiffs sought by this action to recover.

Upon this evidence it was objected that the captain should have informed his owners, by his letter to them of the 5th of *August*, of the accident which had happened to the ship on the 25th of *July* ; which if he had done, the information would have reached them in time to have communicated it to the underwriters, to whom it was material that it should have been communicated. Lord *Ellenborough* C. J. was of opinion that the captain, as agent for the owners, was bound to communicate to them what he knew might be a cause of damage to the ship, and that his omission in this respect, by means of which the owners were prevented from disclosing the accident to the underwriters, operated as an exception of that particular risk out of the policy ; and he therefore directed a nonsuit.

Scarlett now moved to set aside the nonsuit, upon the ground that the plaintiffs were entitled to recover either for an average loss, or for a return of premium ; either the policy attached notwithstanding the concealment, and then they ought to have recovered upon the loss ; or the concealment was material, and the policy void, and then they were entitled to a return of premium.

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He contended that the policy attached notwithstanding the concealment, and that the captain was not bound to inform his owners of every accident which happened, unless it was of such a nature as to cause an apparent damage or a probability of damage to the ship: the mere possibility that she may have suffered from any accident is not enough to make the disclosure of such accident necessary, for if it were, the captain would be bound to write home by every post respecting the most trivial occurrences. Here it is admitted that the captain was not aware of any injury sustained; and it is not imputed to him that he kept back any information from his principals in order to make them the instruments of effecting a fraud on the underwriters; if he had not written at all after the accident it does not follow that the insurance would have been void. His omitting therefore to communicate the accident when he did write, which cannot amount to more than not writing at all, will not vitiate the policy. But if the policy attached, it is a new principle in insurance-law that it may do so for some purposes, and not for others; and that the want of a disclosure of any particular circumstance, which does not amount to such a concealment as will vitiate the policy, may yet amount to an exception of the risk arising out of that particular circumstance.

LORD ELLENBOROUGH C. J. With respect to the question, whether the captain was bound to transmit to his owners intelligence of the accident which happened to the ship on the 25th of *July*, I think that if it were but a dubious cause of damage, he ought to have communicated it; but looking at the circumstances as dis-

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closed afterwards by the captain's protest, must we not say that they amount to something more than a dubious cause, and that there is pregnant evidence that the captain suspected the ship must have sustained some damage, though he might not know what the particular damage was? If then the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy, would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew and might have actually communicated to the plaintiffs the cause of damage, so as to have apprized them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment, will not alter the case as we had occasion to determine yesterday (a). I do not remember that the point respecting the return of premium was made at the trial; but if it was, the answer to it must have been that this is not the case of a void insurance, but only of an exception out of the policy.

LE BLANC J. The antecedent damage which the captain was bound to communicate to his owners, and

(a) *Bridges v. Hunter*, ante 15.

neglected so to do, may be considered as an implied exception out of the policy; and the opinion which my Lord held at the trial must have precluded the plaintiffs from demanding the premium.

The other Judges concurred.

Per Curiam,

Rule refused.

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SIFFKEN *against* ALLNUTT.

Tuesday,
Jan. 26th.

THIS was an action upon two policies of insurance, the first of the 18th of *August* 1811, ON WHEAT, by the ship *Anna Maria*; the second of the 24th of *Sept.* 1811, on money advanced to the captain at *Archangel*, "lost or not lost," at and from *Archangel* to *London*. The loss declared upon was by capture. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term, it appeared that the ship with her outward cargo failed from *London* in *June* 1810, under a licence which the plaintiff had procured on the 25th of *May* preceding. The licence was granted "to *Henry Siffken* for the *Anna Maria* to take a cargo of *British* and *East India* goods at *London*, and proceed to *Newcastle*, and thence to *Archangel*, and to return thence with a cargo of grain and

Where a licence was granted to the plaintiff on the 25th of *May* 1810, to take a cargo from *London* to *Archangel*, and to return from thence with a cargo of grain and other goods permitted by law to be imported to any port of the United Kingdom, and the licence was limited to the 29th of *September* following, which time was afterwards extended

to the 1st of *January* 1811, and the ship after taking in a cargo of pitch and tar at *Archangel*, failed on her homeward voyage on the 13th of *October* 1810, but was driven back to *Archangel*, and there unloaded, and her cargo sold, and the ship laid up for the winter, and did not sail again from thence with a cargo of wheat until the first of *August* 1811: Held, that the licence was not exhausted by taking in the first cargo of pitch and tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed, provided it appeared that the voyage was prosecuted with all reasonable dispatch, which was a question for the jury; and therefore if it should so appear, an insurance effected by the plaintiff on the 18th of *August* 1811, on wheat at and from *Archangel* to *London* would be valid, and would attach on the wheat cargo; but an insurance on money advanced to the captain at *Archangel* was void, and upon that the plaintiff might recover back the premium.

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other goods permitted by law to be imported, to any port of the United Kingdom." This licence was to remain in force until the 29th of *September* 1810, which period, by a general order in council, applicable to all licences, was extended to the 1st of *January* 1811. The ship arrived at *Archangel* in *September* 1810, and on the 2d of *October* discharged her outward cargo, and afterwards took in her homeward cargo, which consisted of pitch and tar, and on the 13th of *October* failed on her homeward voyage. A few days afterwards the frost set in, which obliged her to put back to *Archangel*, and in consequence of some damage she had sustained from another vessel having run foul of her, it became necessary to unload her cargo; and the pitch and tar were accordingly unloaded and sold at *Archangel*. The ship lay there during the winter, and when the frost broke up in *May* 1811, underwent some repairs; and on the 16th of *July* took aboard a cargo of wheat, and on the 1st of *August* again failed on her homeward voyage; in the course of which on the 16th of the same month she was captured by the *Danes*. It also appeared that on the 25th of *March* 1811, the plaintiff had procured another licence to continue for six months, permitting the *Anna Maria* to proceed from *Archangel* to *Leith*. Upon the first policy Lord *Ellenborough* C. J. was inclined to think that it was not intended to cover two successive cargoes, but only one; and therefore that the policy never attached on the second cargo: and on the other policy his Lordship held that the insurance was void; and he allowed the plaintiff to recover the amount of the premium on both the policies, with liberty to the defendant to move to reduce the verdict to the amount of the premium on the second policy.

Park accordingly obtained a rule nisi in last *Michaelmas* term for so reducing the verdict, or for a new trial, contending on the authority of *Lowry v. Bourdieu* (a), and *Vandyck v. Hewitt* (b), that the plaintiff could not recover back the premium on the first policy, inasmuch as the voyage insured was illegal, there not being any period when it was protected by the licence. [Lord *Ellenborough* C. J. said, that supposing the licence to have expired, still perhaps there might be a distinction between the case of an illegal insurance and this case; where it was evident the party contemplated a legal voyage by procuring the licence.]

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The Solicitor-General and *Holroyd*, who now shewed cause, contended that at all events the plaintiff was entitled to retain the verdict for the premium on the first policy, because the voyage insured was protected by the licence, and therefore not illegal; but secondly, they contended that the plaintiff ought to have been further allowed to recover upon the loss, because the policy attached on the second cargo. On the first point, they maintained that the licence, notwithstanding the time specified for its continuance had elapsed, would yet enure to protect the voyage, for the Court would construe it according to its fair meaning and import, rather than according to its strict letter; and in this respect it resembled a policy of assurance or any other commercial instrument. It is material to observe that this was a licence not for an unnamed adventure or an indefinite cargo, but for a voyage declared out and home, and for a cargo specified as a cargo of grain; and the words

(a) *Doug.* 467.(a) 1 *East*, 96.

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limiting its duration to the 29th of *September* are printed, and are therefore to be taken in a sense less strict than if they were written. The object then of the licence was rather to protect a specific adventure than to limit a specific time; and to hold that the adventure must be concluded on the 29th of *September*, would be to defeat the meaning of the licence by a strict adherence to its letter. It was inconsistent with the nature of the voyage that it should terminate within the time specified; which must therefore be intended such a reasonable time as, allowing for the accidents of climate, would be sufficient for the completion of such a voyage. This was so laid down by Lord *Ellenborough* C. J. in *Schroeder v. Vaux* (a), and the Court of Common Pleas yesterday confirmed that doctrine in the case of *Siffken v. Glover*, by refusing a rule for a new trial in an action brought upon this same policy, being of opinion that there was not any unreasonable delay. [Lord *Ellenborough* C. J. said that by limiting the period of the licence, it certainly was in the contemplation of the crown, that the voyage should be prosecuted with all convenient speed; but he had uniformly held that the licence shall not become void by the mere efflux of time, if the voyage be duly commenced and prosecuted within a reasonable time.] Upon the second point they observed that this policy, like the licence, was not a general policy, but upon a specific cargo and voyage; and they relied on the arguments already used upon that point in support of the licence, to shew that the policy also attached on the wheat cargo.

Park and *Campbell*, contra, denied that the case in the Common Pleas decided either of the questions now be-

(a) 15 *East*, 53.

fore the Court, the question there being upon the second licence ; and maintained that this licence being expressly limited to one cargo as well as to a time certain, was exhausted by the cargo of pitch and tar, and could not be extended beyond the express terms of it to a second cargo. Admitting that the accidents of the voyage may create such an inevitable delay as may justify an extension of the licence beyond the precise period limited, it is not so with respect to a change of cargo ; otherwise a licence granted for one cargo only might be extended to any number that the speculation of the party licensed might require. In *Schroeder v. Vaux* there was no change of cargo, and even with respect to the extension of the time in that case, it is observable that the adventure had substantially commenced before the licence expired, by the loading of the goods on board within the time prescribed. That is not so here with respect to the wheat cargo, which was a new adventure begun after the licence had been satisfied by a former cargo, and after the licence itself was no longer in force. In this view of the case it is immaterial to discuss, secondly, whether the policy attached on the wheat cargo ; for if there was no licence at the time when it was effected, the insurance was illegal.

Lord ELLENBOROUGH* C. J. In this case two questions have been made, the first, whether any thing has been done in fraud of the licence. For the determination of that point, it is material to consider what the licence authorizes. It authorizes the taking in a cargo of *British* and *East India* goods at *London*, and proceeding to *Newcastle* and thence to *Archangel* ; it does not, however,

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stop there, but it goes on to permit the return from *Archangel* with a cargo of grain and other goods permitted by law to be imported into any port of the United Kingdom. The cargo of pitch and tar came within the terms of the licence. Where then is the fraud? It is contended that the licence was exhausted by taking in this one cargo. Without considering this as a question to be governed by the rules of construction applicable to policies of insurance, and taking it on the terms of the licence only, can it fairly be stated that the licence was exhausted by this first cargo? The vessel was driven back by the severity of the elements to the port from which she sailed, and there detained; during which detention another cargo was substituted in lieu of the original cargo; but is there more than one cargo imported into this kingdom? Then as to there being any unnecessary delay. The licence, by having fixed a terminus, a quo and ad quem in respect of time, certainly contemplated as speedy a prosecution of the voyage as the nature of it would admit. It may be a fit question, therefore, for a jury, whether due speed has been used; for although the licence is not so peremptory, in respect of the period fixed by it, as to require a strict and literal compliance, yet it must be conformed to as nearly as possible. The question then upon a new trial will be, whether this was a bonâ fide prosecution of the voyage according to the fair import of the licence, which has not been submitted to a jury, the cause not having arrived at that stage of enquiry. The second question is, whether there has been any fraud on the terms of the policy. The policy was specifically on wheat, not on pitch or tar, nor a general policy, and the second cargo is a wheat cargo,

cargo, and quoad this policy the only one; for the Court cannot turn its eye back and look at the cargo of pitch and tar to which the policy does not apply. The voyage with respect to the wheat cargo was prosecuted duly and *bonâ fide*. If, therefore, the voyage was fairly within the terms of the licence, the duplicity of the cargo, (if I may be allowed the expression,) that is, the circumstance of there being a cargo of pitch and tar first, and of wheat afterwards, will not invalidate the policy. The impression upon my mind at the trial must have been that the first cargo occupied the policy, and if that had been the case, it is quite clear that the policy would not have covered two successive risks. But whether that impression was taken improvidently or on the suggestion of others, it now appears to be erroneous; and I cannot help thinking that I could not have seen the policy; or I should have held that it was not intended to cover the cargo of pitch and tar. Upon the first point it is certainly a very fit question for a jury whether the licence was abused by being treated as a floating protection to cover different cargoes, or whether it was not promptly and fairly executed, and the second cargo *bonâ fide* substituted without any unnecessary prolongation of the voyage: if it was, it will be protected by the licence. The second question will be whether there was any fraud upon the underwriters, this being an insurance upon a specific cargo of wheat, from the circumstance relating to the cargo of pitch and tar. I lay out of the case all question upon the second licence; because the party is entitled to stand on the terms of the first licence, and a misconception in procuring another licence shall not operate to his prejudice. Under these circumstances

I think

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I think it fit that the rule for a new trial should be made absolute, but without costs, as there is no fault in either party.

Per Curiam,

Rule absolute.

Tuesday,
Jan. 26th.

HESELTON against ALLNUTT.

Where goods were insured from *Heligoland* to *Memel*, with liberty to touch at any ports and to seek, join, and exchange convoy, warranted free from capture in the port of *Memel*, and the ship sailed from *Heligoland* with orders to go to *Gottenburgh* to know whether to proceed to *Anholt* or *Memel*, and was captured in her way to *Gottenburgh*, which is in the track either to *Anholt* or *Memel*:

Held, that this was to be considered as a voyage to *Memel*, although it was subject to be changed according to circumstances upon the ship's arrival at *Gottenburgh*; and

therefore the risk commenced on her leaving *Heligoland*; and the ship never having reached *Gottenburgh* the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable.

THIS was an action on a policy of assurance on goods by the ship *Vrouw Gesina*, at and from *Heligoland* to *Memel*, with liberty to touch at any ports or places whatsoever and wheresoever, and to seek, join, or exchange convoy, warranted free from capture in the port of *Memel*. The loss alleged was by capture. The case was this: on the 19th of *November* 1810 the ship sailed from *Heligoland* with a cargo of sugar, having a written order aboard which was delivered to the captain by the shippers of the goods at *Heligoland*, directing him to go to *Gottenburgh*, and there ascertain whether he should proceed to *Anholt* or *Memel*, and if he found a convoy at *Gottenburgh* to join it. On the 6th of *December* following the ship was driven by a gale of wind under the batteries of *Skegan*, and there taken by the *Danes*. *Skegan* is about five *German* miles from *Gottenburgh*, and in the track from *Heligoland* to *Gottenburgh*; and *Gottenburgh* is in the way either to *Anholt* or *Memel*.

At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term, the counsel for the defendant objected to the plaintiff's right to recover on

the loss, upon the ground that there had not been an inception of the voyage insured; in support of which objection they relied on the cases of *Woldridge v. Boydell* (a), and *Way v. Modigliani* (b), and a verdict was found for the plaintiff with liberty to the defendant to move to enter a nonsuit upon this objection; which rule was accordingly obtained in last *Michaelmas* term, when another objection was also stated as arising out of the case of *Middlewood v. Blakes* (c), that the captain was restrained by the orders from electing to seek convoy at any place but *Gottenburgh*, whither he was bound to go at all events.

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The Solicitor-General, Park, and Parnter now shewed cause, and first observed upon the liberty contained in the policy to touch at any ports whatsoever, and to seek, join, or exchange convoy, under which they contended that the plaintiff had a right to go to *Gottenburgh* either for convoy or for other purposes connected with the voyage, such as to ascertain the state of the port of *Memel*, without being guilty of a deviation; they then contended with respect to the orders given to the captain as far as they related to *Anholt*, that at the utmost those orders could be considered only as a design on the part of the assured to deviate, which design had never been executed; and that where the termini of the intended voyage are the same as those described in the policy, which was the case here, the voyage is to be considered the same, and a mere intention to deviate will not avoid the policy. It was so held in *Kewley v. Ryan* (d), where the supposed deviation was as much

(a) *Doug.* 16.(b) 2 *T. R.* 30.(c) 7 *T. R.* 162.(d) 2 *H. Bl.* 343.

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contemplated as in this case, and in *Wooldridge v. Boydell*, Lord *Mansfield*. is reported to have said that a deviation merely intended, but never carried into effect, is as no deviation. In *Way v. Modigliani* an actual deviation had taken place, as was observed in *Kewley v. Ryan*; and in *Middlewood v. Blakes*, *Lawrence J.* said that if the vessel had been captured before she arrived at the dividing point, he should have thought the underwriter would have been liable. Now here, allowing the utmost effect to the orders given to the captain, they amount only to a contemplation to deviate, and the ship was captured before the dividing point; so that this case falls within both the distinctions taken in the former cases. As to the captain's judgment being restrained by the orders with respect to the place of joining convoy, upon a similar objection to which the case of *Middlewood v. Blakes* turned, there is no evidence to shew that the captain could have had any opportunity of making an election to join convoy before he reached *Gottenburgh*, and therefore that case does not apply.

Topping and Marryat contra. The application for a nonfuit was made not on the ground of a deviation, but on the ground that there had not been any inception of the voyage insured. To entitle the assured to recover upon a loss, it must be a loss within the voyage insured; and for that purpose it is necessary that the voyage should be declared in the policy. Here it is declared as a voyage to commence at *Heligoland* and end at *Memel*, whereas it appears that the real voyage, so far from being fixed to terminate at *Memel*, was not to be declared until the ship arrived at *Gottenburgh*. Instead, therefore, of being a voyage from *Heligoland*, with a cer-

tain destination to *Memel*, it was to remain in ambiguo until the ship's arrival at *Gottenburgh*, whether her ultimate destination was to be *Anholt* or *Memel*, and nothing was in certainty except that she was to go to *Gottenburgh*. There is therefore a main distinction between this case and that of *Kewley v. Ryan*, and *Middlewood v. Blakes*, where the termini of the intended voyages were fixed as described in the policy, and therefore what was said by *Lawrence J.* in the latter case does not apply to this. But although *Middlewood v. Blakes* differs in this respect from the present case, it is nevertheless an authority in point, to shew that if the captain's judgment was fettered by the orders as to the place of his seeking convoy, it is tantamount to a deviation. Now according to the terms of the policy the captain ought to have joined the first convoy he met; but according to the orders it is clear that he was bound to *Gottenburgh* at all events, and had not an option to seek for convoy elsewhere, nor to join an earlier convoy if he had fallen in with one, and hence the risk of the underwriters was materially increased.

LORD ELLENBOROUGH C. J. 'This is a case which is somewhat new in its circumstances, and at the time when it was moved I wished to have it brought under the consideration of the Court. Having now heard the arguments and what is material to be adduced on the point, I think there was an inception of the voyage insured. The way in which it strikes my mind is this, viz. that the preponderating intent of the assured was to go to *Memel*; although that intent was liable to be changed according to circumstances. But I am not aware that it is laid down in any book, if the terminus be once fixed, that because it is made subject to alteration dependant

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upon circumstances, it shall on that account be less a voyage to that place, to which the party originally contemplated to go. I think that there may be a good inception of the voyage under a fluctuating purpose. Here, as I have said, the preponderating purpose was to go to *Memel*; which appears by the warranty "free from capture in the port of *Memel*." As to the other question, whether under a liberty to seek, join, and exchange convoy the policy may not be affected by fettering the discretion of the captain, we are not called upon to decide that point; because it does not appear that the captain had an opportunity of exercising any discretion as to joining convoy before the capture; and as he never reached *Gottenburgh*, the utmost that can be made of the orders will only be this, that they amount to a contemplated deviation. It may be observed, however, that this liberty is not introduced into the policy by way of stipulation on the part of the assured that they will seek and join convoy, but is granted to them for their benefit, and for the purpose of obviating any doubt as to its being a deviation, in case they should go out of their way in seeking convoy; but I am not aware that the restraining this liberty would vary the rights of the parties. Considering then the case on the question of non-inception, I think that there was a good inception of the voyage from *Heligoland* to *Memel*, subject to be changed according as circumstances might require; and I do not know that such a contingent purpose will defeat a bonâ fide inception. On the other point, if the vessel had gone to *Gottenburgh* and been delayed there by waiting for orders; that would have been a deviation; but as the case is now presented to us, it is merely an unexecuted intention to deviate, which will not vitiate the policy.

GROSE J. I think there was an inception of the voyage, for although the intent was as stated, still it must be considered substantially as a voyage to *Memel*.

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LE BLANC J. It is admitted that *Gottenburgh* was in the way to *Memel*, and also that the vessel was captured in the course of her voyage to *Memel*, and before she reached *Gottenburgh*; and it does not appear that she had any opportunity of getting convoy from the time of her sailing from *Heligoland* until her capture; so that the captain did not act under any restriction. All question therefore of deviation is out of the case, which brings it to the question, whether the vessel failed on the voyage insured. It is clear that although the policy ought to contain an accurate description of the voyage, yet it need not comprise every intermediate port at which the ship may be intended to touch, according to *Kewley v. Ryan* and *Middlewood v. Blakes*. Here *Gottenburgh* was an intermediate port at which the captain was to touch for orders, whether he was to go ultimately to *Anholt* or *Memel*; but the primary intention was to go to *Memel*. If indeed he had gone into *Gottenburgh* merely for orders, it would have been a deviation, as it would have been if he had gone to *Anholt*; but he was captured before he arrived at either of those places. It seems to me that this case in many points resembles that of *Middlewood v. Blakes*, (with the exception indeed of the ultimate destination not being finally settled, upon which I have already observed,) and it was said in that case by *Lawrence J.* that if the loss had happened before the ship came to the dividing point, he should have thought the plaintiff entitled to recover. Here the loss did so happen, and the underwriters ran no additional risk by the captain's intention to deviate afterwards. I

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am therefore of opinion that this verdict ought to stand.

BAYLEY J. *Memel* was certainly one of the places which was primarily fixed upon; and it was not clear when the capture took place that it would not have been the ultimate place of destination. It has been contended however that the judgment of the captain was fettered by the orders to go to *Gottenburgh*; but he never acted upon those orders, and it by no means follows that if he had gone thither he would have staid at *Gottenburgh* longer than for the purpose of getting convoy. It is suggested however that there might be other places at which he might have previously joined convoy; but if it had been proved that an earlier convoy might have been procured at another place, and that notwithstanding, the captain had omitted to join it in order that he might fail to *Gottenburgh*, that might perhaps have been a case of deviation.

Rule discharged.

Wednesday,
January 27th.

GLASER and Another against COWIE and Another.

A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence that he was directed also to insure against *British* capture; for that is not a crime so as to render the whole insurance illegal, though it would be void pro tanto.

ACTION against the defendants as agents of the plaintiffs, for not effecting an insurance according to orders, viz. to insure the premium. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, it appeared that the defendants, who were merchants in *London*, received from the plaintiffs, who resided and carried on business at *Stralsund*, a letter dated the 20th of *April* 1810, and written by their managing clerk, which gave orders to the defendants to effect an

insurance

insurance according to the terms of a memorandum inclosed in the letter. The memorandum contained directions for an insurance on goods to the amount of 7000*l.*, and particularly described the adventure to be insured, and that it was to include loss by *British* as well as foreign capture, and at the conclusion (in a postscript written in *German*) it contained these words, "Observe the *premium* on this value is also to be insured." At the time of the receipt of this letter and its inclosure, the defendants also received another letter from the plaintiffs, inclosing a duplicate of the above memorandum, dated the 23d of *April*, and written by the same person as the former, in which he wrote thus: "I confirm all what I
 " said belonging to the insurance, and send you to-day the
 " note in *English* to avoid all misunderstanding. I added
 " *British* capture, though I know it is not lawful, but hope
 " you will take care for an insurer with whom a policy
 " of honour may be trusted as good and lawful." The defendants upon the receipt of these letters effected an insurance in general terms against loss or capture by any power whatsoever, on the sum of 7000*l.*, but not upon the premium. It was objected by the defendants, that the order for the insurance was illegal, inasmuch as it contained a direction to include loss by *British* capture, and therefore could not be made a ground of action against the defendants for not complying with it. But Lord *Ellenborough* C. J. held that the order was obligatory upon the defendants to insure the premium; for although they might have renounced the order altogether if they had so pleased, yet if they adopted it, they were bound to execute it, as far as by law they might, *secundum formam jubeantis*. Whereupon the jury found a verdict for the plaintiffs.

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Topping now moved for a new trial upon the ground that the neglect of the defendants to comply with the order in one part of it, ought not to place the plaintiffs in a better situation than they would have been in, if the defendants had strictly performed the order in every part. He contended that if they had so done, the plaintiffs could never have recovered upon the policy, because the insurance against *British* capture, which the order directed, would have made the policy void: they ought not therefore to derive from a partial omission of the defendants a benefit which they would not have had, if their order had been completely executed.

LORD ELLENBOROUGH C. J. This omission was certainly a slip of the defendants, which probably arose from the direction respecting the insurance of the premium being in a foreign language, and occurring in a few words at the end of a letter of considerable length. But still as the first letter contained a specific direction, which was confirmed by the subsequent letter, the defendants were bound to attend it. It is true that the plaintiffs say in their second letter, that they added *British* capture, though they knew it was not lawful; but it is not a crime to insure against *British* capture, so as to make the whole policy illegal and void, as this Court seem to have thought in the case of *Lubbock v. Potts* (a); though perhaps such insurance would have been void pro tanto. In this respect the defendants conducted themselves with adroitness by effecting an insurance in general terms, which would be construed to extend to such captures only as they might lawfully insure against.

(a) 7 *East*, 449.

The other Judges concurred; and *Le Blanc* J. added, that possibly the defendants might have met with such an insurer as the letter of the plaintiffs alluded to, with whom a policy of honour might have been entrusted.

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Rule refused.

THOMPSON and Another, Executors, &c. *against*
COTTER, KELLETT, and two Others.

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Jan. 27th.

PLAINTIFFS having sued out an alias bill of *Middlesex* against the four defendants, upon one affidavit of debt, stating them to be indebted to plaintiffs as executors, on which *Kellett* alone was arrested and holden to bail, afterwards declared against *Kellett* separately. Whereupon a rule nisi having been obtained for setting aside the declaration and proceedings for irregularity, and for entering an exoneretur on the bail-piece;

If plaintiffs sue out joint and bailable process against four defendants, they cannot declare against one separately, though the others are out of the jurisdiction of the Court.

Lawes shewed cause, and contended that as where process is not bailable it had been held that several defendants may be joined in one writ, and the plaintiff may afterwards declare against them separately (*a*); so the same thing might be done here, for except as to the right of holding the defendants to bail, there was not any solid distinction between process bailable and not bailable. Besides, here, there was an additional reason why the plaintiffs should be permitted to declare severally, because the other three defendants were in *Ireland*, and could not be served with process.

(a) *Stables v. Aspley*, 1 *Bos. & Pul.* 49.

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Topping and Littledale in support of the rule, relied on *Lewin v. Smith* (a).

Per Curiam. The ac etiam shews that the party has elected that the process shall be considered as joint process, and not as joint and several; and it is not competent to a plaintiff to declare separately against one of four defendants upon joint and bailable process. But an exoneretur ought not to be entered on the bail-piece, as the plaintiffs may declare de novo. Let, therefore, so much of the rule only, as requires the declaration to be set aside for irregularity, be made

Absolute (b).

(a) 4 East, 589.

(b) See *Chapman v. Eland*, 2 New Rep. 82.

Wednesday,
Jan. 27th.

PALMER and WILKINS against BAKER.

An indenture assigning to the plaintiffs a contract for the purchase of timber, upon certain trusts for securing to themselves out of the proceeds the re-payment of the purchase-money advanced by them, and also of a certain balance before due to them, together with interest

THE plaintiffs, who were bankers at *Bourton* in *Gloucestershire*, and had been put into possession of certain timber, part felled and part growing, of *John Huband*, at *Evesham* in *Worcestershire*, brought trover against the defendant, sheriff of *Worcestershire*, to recover the value of part of the timber taken by him in execution at the suit of a creditor of *Huband*. The cause was tried before *Le Blanc J.* at the last assizes at *Worcester*, when the plaintiffs recovered a verdict for 362*l.* 10*s.*, which disposed of all the questions of fact, reserv-

thereon at 5 per cent. up to the time of payment, and also the further sum of 200*l.* as and for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expences which they might be put to on account of the premises, is not usurious upon the face of it; for the 200*l.* allowed for trouble is not necessarily to be intended as a colorable reservation of further interest beyond the legal interest, but as a compensation for trouble not comprehended within the word's costs, charges, damages, and expences; neither is it so excessive as to be intended usurious on that account.

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ing only a question of law upon the construction of the indenture after mentioned, whether it was or was not usurious upon the face of it; as to which the learned Judge had directed the jury in favour of the plaintiffs.

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The indenture, dated the 15th of *May* 1811, was made between *J. Huband* of *Evesham* in the county of *Worcester*, timber merchant, and the plaintiffs, *Palmer* and *Wilkins*, of *Bourton-on the-Water* in *Gloucestershire*, bankers. It recited, that by an agreement in writing of the same date, between the Hon. *J. Lindsay* and the said *Huband*, *Lindsay* agreed to sell, and *Huband* to purchase all the timber growing on the *Lench* estate, the property of *Lindsay*, for 4800*l.*, to be cut in such proportions and manner as therein mentioned, with certain exceptions specified. *Huband* agreed to fell and carry away all the timber before the 29th of *September* 1813, until which time he was to have the use and occupation of the woodland, and was then to deliver it up to *Lindsay* in a proper state for cultivation, under the penalty of 7*l.* an acre. And *Huband* also agreed to give up to *Lindsay* any of the timber at a valuation to be made by two indifferent persons, and to pay *Lindsay* for the purchase of the timber and the occupation of the land 4800*l.*, viz. 600*l.* on the execution of the agreement, a banker's acceptance for 1600*l.* payable at 75 days after date, and another like acceptance for 300*l.* payable on the same day, two other such acceptances for 1000*l.* each, payable 10 months after date; and another such for 300*l.* payable on the same day. That *Huband* should be allowed proper roads for conveying the timber off the lands. In case it should appear that the timber was not a valuable bargain to *Huband*, *Lindsay* was to make him a reasonable allowance for the timber reserved standing, &c. The indenture recited further that *Huband* being indebted to the plaintiffs *Palmer* and *Wilkins*

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Wilkins in 1424*l.* upon the balance of his account, it was agreed between them that he should assign the above-recited agreement and all his interest under it to *Palmer* and *Wilkins* in manner and for the purposes thereafter mentioned, they undertaking to fulfil the said agreement with *Lindsay* on the part of *Huband*, with respect to making the several payments at the times and in the manner therein mentioned. The indenture then witnessed that *Huband* for the considerations mentioned sold, assigned, and set over to *Palmer* and *Wilkins* all the timber and other the premises mentioned in the recited agreement and agreed to be purchased by *Huband* of *Lindsay*, together with the agreement itself, and all *Huband's* interest therein, upon the trusts and subject to the proviso after-mentioned, i. e. upon trust, in the first place, out of the proceeds which may from time to time arise from the sale of the premises to retain and repay themselves first the 4300*l.*, the amount of their acceptances for the purchase-money as aforesaid; then the said 1424*l.* owing to them from *Huband* upon his account stated, together with interest thereof at 5*l.* per cent. up to the time of payment; and also the further sum of 200*l.* as and for a reasonable profit and compensation for the trouble they will be at in the present business; and also all costs, charges, damages, and expences which they shall or may expend, be put to, or be liable for, on account of the premises or in anywise relating thereto. And for the more easily carrying into effect the said trusts *Huband* appointed them his attornies, for and in his name to sell, carry away, and dispose of the timber and bark, and receive and sue for the money due thereon, and to perform all other lawful and reasonable acts in and about the premises. Then followed covenants by *Huband* that he had lawful authority to

assign the premises to *Palmer* and *Wilkins*, free of all incumbrances, and to let them take possession, &c.; and a proviso that in case the money to arise by the sale of the timber and premises should not be sufficient to repay *Palmer* and *Wilkins* the said several sums of 4800*l.*, 1424*l.*, and interest thereon, and 200*l.*, and all the said costs, charges, and expences, then *Huband* should pay them what should then appear to be due to them. But if the money to arise from such sale should be more than sufficient to pay the said sums, then they should repay and re-assign to *Huband* the surplus.

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It appeared in evidence at the trial that *Huband* was indebted to the plaintiffs as bankers in 1424*l.*, and also in 600*l.* for an advance by the plaintiffs to make good *Huband's* deposit to *Lindsay*, with whom he had contracted for the timber; and previously to entering into the deed *Huband* applied to the plaintiffs, telling them he had made a beneficial bargain, if it could be realized, but he could not realize it, and he proposed to the plaintiffs to assign his interest to them by way of mortgage. The plaintiffs refused that, but offered to take an absolute assignment of the property, and to stand in *Huband's* place. *Huband* declined this offer, but further proposed that, if the plaintiffs would take upon themselves the working of the timber, and also the making the payments, he should make them an allowance of 200*l.* for their trouble; which was agreed to. At that time a very small part of the timber was cut, the rest was standing. In a week afterwards *Huband* went on the ground, and told the workmen that the timber was the plaintiffs' property, and that they were to be their paymasters.

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masters. The bankers lived 24 miles from the place where the timber grew.

Puller obtained a rule nisi in last *Michaelmas* term for entering a nonsuit, upon the ground that after the deed between *Huband* and the plaintiffs had already provided for the re-payment of all the money due and advanced, with interest thereon, and also of all costs, charges, damages, and expences which the plaintiffs might incur on that account, a covenant for the further payment to them of 200*l.* by way of compensation for trouble was usurious upon the face of it, and the deed therefore void.

Dauncey, Jervis, and Abbott now shewed cause, and after suggesting that the stipulation respecting the payment of interest might perhaps be deemed to extend only to the sum of 1424*l.*, which was the last antecedent, and not to the sum of 4800*l.*; in which case, the interest upon the latter sum would far exceed the additional 200*l.* agreed to be paid, as a compensation; contended that without the aid of such a construction the covenant for the further payment of the 200*l.* was not usurious. The Court will not infer usury unless it be a necessary inference, neither will they raise that inference by weighing very nicely the quantum of compensation, if it can be shewn that there was any substantive trouble in respect of which a compensation might be agreed upon. Now here considerable personal trouble was cast upon the plaintiffs in carrying the stipulations of the deed into effect, which would not come under the head of costs, charges, damages, or expences to be recouped out of the sale price; such as the trouble attending the hiring and pay-
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ment of the workmen, keeping an account of wages paid, and the loss of time in superintending the felling the timber; and these are enough to shew that the covenant for the payment of the 200*l.* is not without consideration.

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Puller contrâ. The covenant for payment of interest extends as well to the 4800*l.* to be advanced as to the 1424*l.* due. Then there is no expence or trouble cast upon the plaintiffs for which the deed has not expressly provided that they shall be reimbursed, and consequently the covenant for the payment of 200*l.* by way of compensation for their trouble, is only a color to cover a further rate of interest, and the deed is usurious upon the face of it. It is said that the payment of the labourers and keeping the account of such payments is an additional trouble not provided for by the deed: to which it may be answered, that this is a trouble for which the plaintiffs are not entitled to any remuneration; for they are bankers, and it is a part of their ordinary business as such to make payments and keep accounts of them. As to the felling the timber, if it was necessary to employ an agent for that purpose, and as to their own trouble and expence of superintending that agent, if any such were incurred, the deed allows them to retain to that amount. [*Le Blanc* J. The covenant by liquidating the amount of the compensation in respect of trouble at 200*l.* precludes them from claiming to make a deduction beyond that amount. Lord *Ellenborough* C. J. Suppose the covenant instead of stipulating for a compensation to the amount of 200*l.* had been in blank, could the Court upon looking at this deed pronounce that the execution of the trusts would not be attended with any such portion of trouble as might be a fair

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fair subject of some compensation : if it could not, can we then say that the 200*l.* inserted in the covenant as the liquidated amount of that compensation is so much beyond what is reasonable as to amount to a color for usury ? It was to occupy them for three years, and to be attended with no inconsiderable trouble in making payments. Then if they were entitled to something on that account, can we say that filling up the blank with 200*l.* is so extravagant upon the face of it as to make the agreement usurious ?] This case very much resembles that of *Scott v. Brest (a)*, where the defendant was appointed by deed the receiver of the rents and profits of an estate in order to secure to himself the payment of the interest on a loan of money ; and because the deed reserved to him a payment of 40*l.* per annum by way of commission for receiving the rents over and above the interest, it was therefore held usurious. [Lord *Ellenborough* C. J. To be sure that case had all the features of usury, for the defendant who was mortgagee in possession, was to be paid a commission for receiving his own rents.]

LORD ELLENBOROUGH C. J. The question for our consideration is, whether this indenture is usurious ; and if it appeared on the face of it from a fair construction of all its parts, that the 200*l.* allowed to be retained as a compensation for trouble, was in reality only to be allowed in extension of the interest for the loan, it would amount to gross and indubitable usury. But looking to the trusts of this deed, I think there certainly is a considerable share of trouble imposed upon those who are to carry these trusts into effect, which entitled them to

some compensation, and that to a considerable amount beyond the interest reserved: and although a special provision is made for reimbursing them all costs, charges, damages, and expences which they may be put to; yet that is to be confined to expences incurred by them in the cutting down and felling the timber, which might be going on for three years: but still there may be other sources of expence incurred by them, which would not properly fall under either of those heads. For instance, a portion of the labour and time of their clerks and servants, who probably are persons paid by the year, would be occupied in keeping the accounts: a waste of books would be also incurred, besides an occasional personal attendance and trouble of the plaintiffs themselves to inspect the accounts, which would only be satisfied under the 200^l. But in order to support a charge of usury, it ought to appear clearly that the payment stipulated for was either colorable and frivolous in its nature, or excessive in its amount. As to its being frivolous, from the observations already made, I cannot say that some compensation was not due, because it would require considerable personal trouble for three years: and with respect to its being excessive, I have no scale nice enough to balance the trouble which is imposed upon the plaintiffs in carrying the deed into execution with the amount of the compensation agreed upon, so as to convince me that it is so much beyond an equivalent as to be necessarily usurious; and without some proof of that sort which lies upon the party who alleges usury, the compensation must be taken to be a fair one, and the instrument valid. If that be so, the plaintiffs have acquired a legal title under this deed, and consequently are entitled to retain their verdict.

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GROSE J. Before we give effect to this objection, which is to invalidate the deed, we must see clearly that this is a case of usury; that the 200*l.* was meant as a further compensation beyond the legal interest for the advance of the loan. At first I had some difficulty in conceiving that so large a sum as 200*l.* could be allowed merely as a compensation for trouble; but upon looking further into the deed I perceive that the carrying its trusts into effect would probably last between two and three years. During that time the plaintiffs might have a great deal of trouble in procuring fit workmen and proper markets to dispose of the timber, and therefore it seems fair that a provision should be made for paying them so much as their trouble might require. Such a provision then in itself is not colorable, and under the circumstances I cannot say that 200*l.* was more than their trouble might require in getting back their principal and interest.

LE BLANC J. In order to defeat the plaintiff's title under this deed the Court must see clearly that it is usurious on the face of it. It must be remembered that we are called upon to decide on the deed as it now stands, without waiting for the comment on it which might have been made after the whole accounts between the parties had been wound up, and the final result had appeared on the bankers' books. The argument now used to shew that the deed is usurious is this, viz. that all the trouble and expence which the plaintiffs may incur in engaging labourers and taking the other necessary measures for the felling and sale of the timber, are provided for under the words "costs, charges, damages, and expences," enumerated in the deed, and therefore the

allowance of 200*l.* for trouble which is already comprehended within those words must be necessarily colorable. But the words may bear a very different construction when coupled with such a specific allowance for trouble as in the present case, from that which they might have borne if no such allowance had been made ; so that now they will not comprehend a general charge for trouble, but the plaintiffs will be limited upon that head to the specific sum of 200*l.*, whatever their trouble may be, and this allowance therefore may be considered as restrictive of the construction to be put on those words. As to the construction suggested that the 200*l.* may be considered as allowed in lieu of interest upon the money to be advanced, I do not agree to it ; for I take the words “ together with interest thereof up to the time of payment,” to relate as well to the 4800*l.* as to the 1424*l.* before mentioned : the plaintiffs therefore are not entitled to the benefit of that argument.

BAYLEY J. If any part of the 200*l.* agreed to be allowed as a compensation for trouble, was intended as an additional bonus for the advance of the money, it would amount to a reservation of usurious interest, and the instrument would be avoided by it ; but if the whole sum be referable to trouble only, then the transaction will be a fair one. And it is difficult to say that the whole of the 200*l.* was not for trouble : if the defendant meant to insist that a part of it was not for trouble, that would have been a question for the jury ; but there is nothing to lead us to a conclusion that the whole was not for trouble. The very act of assigning this timber to the plaintiffs cast on them a duty and responsibility ; and it is admitted, that the plaintiffs were not skilled in the business, and must

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have employed an agent to superintend it, and consequently they must have gone to the spot from time to time to see that that agent did his duty; for they would have been liable over to *Huband*, if he had been guilty of any gross neglect of his duty. In addition to this they had the trouble of paying the workmen their wages, and finding out purchasers. The jury have not found that the compensation was colourable, or excessive; and upon the face of the deed we cannot say that it is.

Rule absolute.

Wednesday,
Jan. 27th.

SMYTH, Clerk, *against* SAMBROOK.

In an action on the stat. 2 & 3 Ed. 6. c. 13., for not setting out the tithe of wheat, barley, oats, peas, and vetches; the jury found a custom throughout the parish for the parson to take the 11th shock of wheat and the 11th cock of barley, &c., Held, that there was a sufficient consideration for the custom as to the wheat, it appearing that the farmer had always been used to put the sheaves into shocks, and in case of bad weather to open them to dry, and therefore the custom was good: but as to the barley, &c., there was no sufficient consideration, it appearing that the farmer only put them into cocks without doing any thing farther, except that in case of wet weather, before the parson took them, he opened the cocks of barley and oats, and put them up again, which was in fact for his own benefit: the custom therefore as to the barley, oats, peas, and vetches was held void.

THIS was an action of debt; the first and second counts of the declaration were framed upon the stat. 2 & 3 Edw. 6. c. 13.; the first stated that the plaintiff was rector of *Worthen*, in the counties of *Salop* and *Montgomery*, and proprietor of the tithes of corn, grain, and hay, clover, rye-grass, and peas and vetches growing on land within that part of the parish lying within the county of *Salop*, in the occupation of the defendant, and all such tithes for 40 years before the statute ought to have been set out and paid in kind. And then it charged that the defendant had cut down and reaped so many acres of corn, grain, and hay, and clover and rye-grass, and peas and vetches growing upon

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the said land, the tithe whereof belonged to the plaintiff, and ought to have been justly divided, set out, and paid to him as rector and proprietor ; yet, that the defendant, after reaping, cutting down, and gathering the said corn, &c. took and carried away the same from the land where the same had so grown, &c. and ought to have been tithed, *the 10th part* of the same, or of any part thereof respectively, *not having been justly separated, divided, or set out from the 9 parts residue thereof*, nor any composition made with the plaintiff for the tithe thereof, &c. contrary to the form of the statute. The second count was for the subtraction of the same tithes ; only stating the plaintiff generally to be the proprietor of certain tithes in that part of the parish lying within the county of *Salop* ; and it stated the gravamen to be the carrying away by the defendant of the corn, &c. growing upon the said land, the tithe of which belonged to the plaintiff, and of right ought to have been set out and paid to him, *the 10th, or other part* of the same respectively, or of any part thereof not having been duly separated, divided, and set out from the residue thereof, as the same of right ought to have been done. There were other general counts for the value of tithes belonging to the plaintiff, arising out of certain lands in the parish, &c. in the defendant's occupation.

This cause was tried before *Le Blanc J.* at *Shrewsbury*, when the jury, upon the question being left to them on the evidence, found that there existed throughout the parish an immemorial custom for the rector to take the 11th mow or shock of wheat, and the 11th cock of barley, oats, peas, and vetches ; on which a verdict was taken for the plaintiff for treble the value of the different titheable matters, with liberty to move the Court

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to enter a nonfuit, or to reduce the damages, in case the Court should be of opinion on the evidence, that such custom was valid in point of law as to all or any of the subjects of tithe; and for that purpose the treble value of the wheat was settled at 45/., the treble value of the barley and oats at 39/., and that of the vetches and peas at 6/. The evidence was, that as to the wheat, the farmer had always put the sheaves into shocks or mows, consisting of 6 or 9 sheaves; and in case of bad weather, opened the mows or shocks and the sheaves to dry them, and that the parson's 11th mow or shock was set out at the time the whole was ready to carry and not before. As to the barley and oats, it was proved that they were put into cocks, and the 11th cock set out for the rector; but nothing farther was proved to be done to the barley or oats, except that some of the witnesses said that if it was wet weather before the parson tithed it, they opened all the cocks and put them up again. As to the vetches and peas, they were first cut into little wads of unequal size, and then put into cocks of equal size, and the parson had the 11th cock; and they gave the parson notice to tithe, as soon as they were put into cocks. A rule nisi having been obtained by *Jervis* in the last term, according to the liberty reserved at the trial;

Dauncey, Abbott, and Eyton now shewed cause. As to the wheat, the usual and common law mode of tithing that article is in the sheaf (a). It may be admitted, however, that a custom for setting out the tithe of wheat in the shock, and not in the sheaf, has been holden to be

(a) See the authorities cited in *Halliwell v. Trappes*, 2 Taunt. 58.

valid (*a*), but the cases in which that mode of tithing has been sustained go no farther; they decide nothing as to the quantum to be rendered; for it was not denied in any of them that the 10th shock was due; and it is singular that even that custom was resisted upon the ground of there not being a sufficient consideration for it, which consideration it is now contended is sufficient to bind the parson to take the 11th shock. The question, therefore, now before the Court goes farther than any of those cases, and is this, Whether upon the evidence as reported by the learned Judge, a custom for setting out the tithe of wheat in the 11th instead of the 10th shock is a valid custom. It is clear that in order to support such a custom, there ought to be an adequate consideration, *i. e.* a degree of labour, beyond what the common law requires, bestowed by the farmer upon the subject-matter of the tithe, and that too not for his own benefit, but for the benefit of the parson. But the labour which the farmer has bestowed in this case by putting the sheaves into shocks, has been done for his own benefit alone; for it is for the farmer's convenience that the wheat should be shocked as soon as possible without incurring the delay which would necessarily be occasioned by the parson's tithing it in the sheaf: the parson on the one hand cannot compel him to extend his labour beyond the sheaf, neither can the farmer on the other hand compel the parson to take an 11th instead of a 10th, which is his due, because he chooses to extend his labour to the shock. The only case which seems to sanction such a custom as the present is an anonymous one in *Latch* (*b*); but its authority appears to have been over-ruled by a

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(*a*) *Pern v. Fountain*, 1 *Wood's Dec.* 504., cited in 4 *Grwm.* 1509.

(*b*) *P.* 226.

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subsequent decision in *Trewin v. Bond* (a). In that case a custom to set out the tithe of corn in stiches of 12 sheaves, or stiches of 10 sheaves, and to pay no tithe for the odd number of sheaves under 10, was holden to be void. If then the additional labour performed by the farmer in putting the sheaves into stiches, was not considered in that case as sufficient to warrant the deduction of so minute a portion as the tithe of the odd sheaves, the same degree of labour will hardly be deemed sufficient to sanction the withholding of so large a proportion as would be effected by the payment of an 11th instead of a 10th shock. In support of a custom apparently so beneficial to the farmer, it ought at least to be shewn that there exists some proportion between the value of the additional labour bestowed and that of the tithe withdrawn, whereas upon a comparison of the two, the result may be proved to be in favour of the farmer in the proportion of 16 to 1. As to the oats, barley, peas, and vetches, they contended that it appeared the cock was the first state in which they became of equal size so as to be capable of comparison, and consequently the first stage in which they could be tithed; and they referred to *Woodshaw v. Hill*, C. B. Trin. 2 & 3 Geo. 2. cited by Parker C. B. in *Erskine v. Ruffles* (b). With respect to these also it was not proved that the farmer had done any thing more than the common law required in order to put them into a tithable state; and consequently no foundation was laid for the custom as to either of them.

• *Jervis, Peake, and Puller*, contra. The principle of tithing is laid down by the Judges in *Knight v. Halsey* (c)

(a) 2 Gwm. 565.

(b) 3 Gwm. 967, 8.

(c) D. P. 2 Bos. & Pul. 196. 4 Gwm. 1554. S. G.

as follows: "The right of the parson to his tithes in kind accrues on the act of severance: his right to *take* the tithe accrues when the tithable matter after severance is in the earliest stage of the course of husbandry applicable to it, in which the tenth part may be easily distinguished from the other nine." The same doctrine is held by the Chief Baron in *Collyer v. Howes*, in these words, (a). "The general and irrefragable law of tithing is that each article is to be tithed when it comes into such a state of severance that the parson may see whether he has his fair tenth. The stage of the process in which that object is best attained marks the time of tithing." It is upon this principle that the common law mode of tithing wheat is in the sheaf, the same being the first convenient state in which the tithe can be collected after the corn is cut, affording the parson an opportunity of comparing his tenth with the other nine parts (b). But although this be the general rule, still where according to the usage the farmer bestows more labour on the subject-matter of the tithe than is required by the common law, that may be a good consideration to uphold a custom for his rendering less than the whole. Accordingly Lord *Kenyon*, in *Knight v. Halsey* (c), after recognizing the common law mode of tithing corn, expressly lays it down, that if the farmer adds his own labour, and takes care of it until it is made into shocks, he may by custom be excused by paying only an eleventh or twelfth part of the corn: in such cases the labour of the farmer added to the quantum of the tithe

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(a) 3 *Anstr.* 954. 4 *Gwm.* 1490. S. C. See also *Halliwell v. Trappes*, 2 *Taunt.* 58, 9., and *Shallcross v. Fowle*, 13 *East*, 267.

(b) See the authorities brought together by *Lawrence J.* in *Halliwell v. Trappes*, 2 *Taunt.* 58., and *Shallcross v. Fowle*, 13 *East*, 267.

(c) *B. R.* 7 *T. R.* 93.

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is considered to be an equivalent for the full tithe. With respect to the wheat therefore, this case falls precisely within the foregoing principles, and the case in *Latch* also instead of standing alone is supported by them as well as by the cases of *Johnson v. Aubrey* (a), and *Durrant v. Booty* (b). *Trewin v. Bond*, which is said to have overruled it, is very distinguishable; for there the claim was to be exempted from payment of tithe, not in respect of the odd sheaves (as stated) but of the odd stitches, which was clearly a subtraction of the parson's due. As to the barley and oats, it is not contended that they are tithable before they are put into cocks; *Woodsharw v. Hill* and other cases have decided that to be their tithable state; but the question here is, has not the farmer done more than the common law required him to do? His duty was simply to put them into cocks, but it appears that he also opened them whenever the rain came; and further, that notice to the parson to take away the tithe was not given until they were in a state ready to be carried. The process of husbandry was therefore completed upon them, and they were brought into the same state with the remainder, which the farmer was about to carry himself. [Lord *Ellenborough* C. J. The wheat being tithable originally in the sheaf, the extra labour employed in putting them into shocks may be a compensation for the substitution of an eleventh instead of a tenth; but as to the other matters is there any other labour than the common law requires except ventilation, which is too uncertain and minute to warrant a departure from the common-law right?] The quantum of labour is im-

(a) Cited in a note to *Andrews v. Lane*, 2 Gwm. 473., *Moor*, 910. *Cro. Eliz.* 660., S.C.

(b) 2 Lutw. 1071., 2 Gwm. 578., S.C.

material. As to the peas and vetches, it is not so clear that the cock is the state in which they are tithable; there is no decision to that effect: and in *Mantell v. Paine* (a) it was said by the Chief Baron that with respect to peas there is no definite mode of tithing that article to be found in the books. If then they might have been tithed in the wad, the reducing them into cock is an extra labour; and even admitting that they could not have been so tithed, still the farmer bestowed some labour upon them by husbanding them, in the same manner as the oats and barley, until they were fit to carry. There is therefore a consideration to support the custom, as well in respect of the peas and vetches as of the other articles.

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Lord ELLENBOROUGH C. J. I confess I think in this case that the custom is good as to the wheat, but not as to the other articles. It appears that the wheat, which at common law is tithable in the sheaf, is uniformly advanced to a further stage of labour by being put into shocks, by which it is better protected from the weather: and besides that, if necessity demand it, it is opened for the purposes of ventilation. This benefit, together with the additional labour by the farmer for the benefit of the rector, which the rector must otherwise take upon himself, constitutes a good consideration for rendering the 11th instead of the 10th shock. I subscribe to the doctrine laid down by Lord *Kenyon* in *Knight v. Halsley*; that the labour of the farmer added to the quantum of the tithe taken, is considered to be an equivalent for the full tithe. But as to the other articles, there is no evidence of any meritorious labour bestowed

(a) 4 Gwm. 1511.

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upon them, sufficient to support any custom. All that is done to the barley and oats is the putting them into cocks; and the mere additional labour of casually opening them in the event of wet weather, does not seem to me in any degree such a consideration as in the language of Lord *Kenyon* amounts to an equivalent for the deduction claimed. It is too minute; it ought to be a reasonable benefit to the parson. As to the peas and vetches, it does not appear that any thing is done to them beyond what the common law requires. It is clear that they cannot be tithed in the wad; for the wad was proved to be of unequal size, and therefore they are not then in a state in which a just comparison can be made. It is then the duty of the farmer to put them into such a state, which can only be effected by advancing them to an ulterior stage of preparation, *i. e.* by putting them into cocks; which is the first stage in which they are tithable. I think therefore that the verdict should stand, except as to the sum of 45*l.*, the treble value of the wheat.

GROSE J. As to the wheat, the custom seems to me to be good; but as to the barley and oats, there is no adequate consideration. And as to the peas and vetches, it would be doing mischief to them to open them again. They would be more likely to be injured by shaking.

LE BLANC J. There is a manifest difference between the wheat and the other articles. In the case of the wheat, there is an ulterior process, to which it is carried after being tithable. It is put into a more convenient stage to be carried, which is at all times an additional species of labour imposed upon the farmer; and then again in case of bad weather, the shocks are opened and venti-

ventilated, which is a further benefit to the rector: that appears to me an adequate consideration for the custom. With respect to the rest; the parson's share is not distinguishable nor the whole tithable until put into cocks: and the farmer cannot bring in aid any occasional ulterior labour which may accidentally be done to the cocks on a wet day by opening them, which the farmer would do for his own benefit, in order to found a consideration for the custom. Until the cocks were actually set out, the farmer could not tell which were the parson's and which were his own; but after the tithe was set out, it does not appear that he ever opened the parson's cocks.

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BAYLEY J. I agree with the rest of the Court. The wheat being advanced one stage in the course of husbandry, is a consideration for the custom; and that superadded to the probable expence and trouble attending the re-opening of the flocks in case of bad weather, bears some proportion to the deduction claimed, in giving the 11th instead of the 10th part. But as to the other corn, it will be entirely matter of accident, whether any thing beyond what is required by the common law will be done; and the mere probability of extra trouble is not a sufficient consideration to warrant the custom. With respect to the peas and vetches, the putting them into wads is little more than merely severing them from the root; and there is no evidence of their being opened again after bad weather.

Rule absolute for reducing
 the verdict 45/.

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*Wednesday,
Jan. 27th.*

Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor pursuant to charter: Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the sacrament within one year, were not thrown away so as to authorize the returning officer to return another candidate who was in a minority.

The KING against BRIDGE.

UPON a rule for an information in nature of a qu warranto against the defendant for exercising the office of mayor of the borough of *Colchester*, it appeared that by the charter granted to that borough in the third year of his present majesty, it is directed that yearly on the *Monday* next after the feast of the decollation of *St. John the Baptist*, the free burgeses of the borough or the major part of them shall *nominate* two of the aldermen of the borough; and the mayor of the borough and the residue of the aldermen or the major part of them, after such nomination, shall *elect* one of the same aldermen so nominated to be mayor.

On the 31st of *August* 1812, (the day appointed by the charter,) a meeting of the free burgeses was held, at which two persons of the names of *Smith* and *Sparling* together with the defendant, being all three aldermen of the borough, were put in nomination by the free burgeses. The mayor having called for a shew of hands, declared the majority to be in favour of *Smith* and *Sparling*, whereupon a poll was demanded on the behalf of the defendant, and proceeded in. During the progress of the poll, and when the total number of free burgeses who had voted were as follows, viz. for *Smith* 99, for *Sparling* 91, and for the defendant 11, the defendant enquired of *Sparling* if he had taken the sacrament within a year; to which *Sparling* answered that he had not; whereupon the defendant gave notice to the free burgeses that *Sparling* was ineligible. A fresh nomination did not take place, but the remainder of the free burgeses were allowed to poll, at the close of which the total numbers were

were for *Smith* 133, for *Sparling* 123, and for the defendant 22 : but the mayor, considering *Sparling* as ineligible on the ground above stated, returned *Smith* and the defendant to the residue of the aldermen, who afterwards elected the defendant to the office of mayor.

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Marryat was to have shewn cause against the rule ; but declined arguing the point, finding that the Court were against him : the Court being clearly of opinion that as notice of the ineligibility of *Sparling* had not been given until after 91 persons had voted for him, the mayor was not at liberty to treat those votes as thrown away ; and to return the defendant, who was in a minority. Whereupon the rule was made absolute (a).

Scarlett was to have supported the rule.

(a) See the opinion of *Le Blanc J.* in *R. v. Parry and Another*, 14 *East*, 563.

BARNES *against* MAWSON.

Thursday,
Jan. 28th.

TROVER for coals, tried before *Wood B.* at the last assizes at *York*. The plaintiff claimed the coals as having been raised from under his freehold tenement called *Whichwell Slacks*, in the manor of *Shelf*, to which he derived title through a series of conveyances in fee simple from the year 1655 ; the first of which convey-

Upon a question whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to shew by parol evidence

that there was a known distinction within the manor between old and new land, and that in fact the plaintiff's lands lay within the boundary of the new land ; and also to shew by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under the plaintiff's lands was in the lord.

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ances dated in that year contained a covenant for quiet enjoyment, with an exception of "the yearly sum of 12*d.* lord's rent; and also the yearly sum of 8*d.* tithe-money due forth of the premises to the lawful owners or receivers thereof, and of services due to the chief lord or lords." The defendant claimed under the *Saville* family, lords of the manor of *Shelf*, who, as he contended, were entitled to all the coals within a certain district of the manor called the *new land*, which was described as land formerly taken in and inclosed from the commons and wastes of the said manor, and was contradistinguished from another district within the manor called the *old land*, within which latter the defendant admitted that the freeholders and not the lord were entitled to the coals under their own freehold land respectively. The evidence in support of the defendant's claim was principally of two descriptions; 1st, That which went to shew that *Whichwell Slacks* was comprehended within the new land; as to which the chief evidence was that it lay within the known boundary line, and was surrounded by other farms that were within the new land, and was always so called by persons who knew the boundaries of the old and new land. 2dly, That which related to acts of ownership exercised by the lords of the manor of *Shelf* and their lessees over the coals lying within the new land; and there was also evidence received (after objection taken by the plaintiff, and overruled) as to the reputation within the manor that the right to the coals within all the new land belonged to the lord, but not to the coal under the old land. Under this second description of evidence several leases from the *Saville* family, between the years 1692 and 1736, were produced, which demised for terms of years to several persons of the name of

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Woodhead all the mines and veins of coals of Sir G. Saville, the lessor, then open or which might be found in all those commons or waste grounds of the said Sir G. called *Shelf* common, or in any other grounds of him the said Sir G. in the township of *Shelf*, with liberty to dig and get the same; and in 1806 there was a demise from R. L. Saville, lord of the manor of *Shelf*, to *Aydon* and *Elwell* of all the veins and seams of coal then open or thereafter to be opened, and also of all mines of metal, stone, and slate, as well in and under the commons or waste ground which lie open, as under *the new land*, theretofore parcel of and inclosed from the same. It also appeared by the court-rolls of the manor of *Shelf* from the time of *Jac. 1.* to 1787, that there were various entries of payments made and conveyances noted, viz. :

13 *Jac. 1.* Manor of *Shelf*, court baron of Sir G. Saville. Deb. *Brooksbank*, pro uno tenemento called *Whitfield Slack*.

22d October 1763. Manor of *Shelf*, court baron. Find *Daniel Mortimer*, who held *Lower Whichfield Slack*, has conveyed it to *John Field*.

4th October 1774. Manor of *Shelf*, court baron of Sir G. Saville. *Daniel Mortimer* on the jury. Among the tenants, *Daniel Mortimer*, 1s. *Lower Whichfield Slack*, or *Soper-lane End*.

2d May 1787. Court baron of *John Hewitt*, devisee of Sir G. Saville. Under the tenants' names, *James Mortimer*, 1s. *Soper-lane End*.

It was proved by several witnesses that the *Woodheads* and their servants, for a series of years as far back nearly as the time of living memory, had been in the habit of driving for coals indiscriminately within the new land, without regarding to whom the several tenements under which

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which they worked belonged, and that *Aydon* and *Elwell* succeeded them, and that nobody but the lord's lessees had in fact got coals in the new land : but no coal had been got under the identical land of the plaintiff, nor had it been worked before 1810. A witness also proved that in *April 1789*, when the plaintiff's tenement (*Whichwell Slacks*), which then belonged to one *James Mortimer*, was sold by him to one *Thomas Hurst*, he (the witness) had valued the land for *Hurst* at 140*l.*, which was the value of the surface only, without comprizing the minerals (coal and stone), which would have been worth 200*l.* more.

Wood B. told the jury, that at some remote period, the lord of the manor of *Shelf* might, by some deed now lost, or destroyed by time and accident, have granted the wastes of the manor to the then freeholders and their heirs, to inclose to their own use, reserving to the lord and his heirs the coals and minerals within those wastes ; that although the deed was lost or destroyed, yet the right of the lord would remain if it could be made out by evidence of long, uniform, and uninterrupted exercise of the right of getting those coals and minerals, and the reputation and tradition of old persons who were dead ; that it was natural that the ancient freeholds existing before the inclosure should be called *old* land, and the wastes when inclosed should take the name of *new* land. He therefore left it to them to consider, 1st, whether, from the evidence of the exercise of the right, and the reputation, the lord had the general right to the coals under and throughout the new land : if he had, 2dly, whether the plaintiff's tenement, entirely surrounded by the new land, was or was not part of the new land. If they found the general right with the lord, and that the

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plaintiff's tenement was new land, their verdict would be for the defendant; but if they found either against the general right, or allowing that, if they thought the plaintiff's tenement not new land, their verdict would be for the plaintiff. The jury found generally for the plaintiff, with 33% damages, without specifying the particular ground of their verdict. This case came on upon a rule nisi obtained by *Clayton Serjt.* in the last term for a new trial, on the ground of its being a verdict against the weight of evidence, and against the opinion of the learned Judge at the trial, which latter ground the learned Judge now confirmed, by stating in his report that he rather thought the weight of evidence against the plaintiff on both points.

Park, Topping, and Littledale shewed cause against the rule, and first adverted shortly to the evidence of reputation, which they contended was not admissible in matters of private right, or to prove particular facts; such as were the questions in this case as to the right to the coals within the new land, and as to this particular estate having been always called new land. [But Lord *Ellenborough C. J.* said that the reputation as to whom the right to the coals belonged was not to be considered as reputation standing by itself, but was accompanied with an uniform usage and exercise of that right; for the fact of getting coal by the lord in the new land, did not rest on vague or loose evidence, but it was general, clear and abundant: as to the reputation that the estate was always termed *new land*, the evidence was admissible, in the same way as concerning the boundaries of a manor (a), to shew what was the boundary of the new land

(a) 14 *East*, 331, *Nicholls v. Parker*.

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within the ambit of which this particular estate was included ; and upon this part of the case there was no farther discussion.] They then proceeded to the principal question, whether the evidence was sufficient to prove that the lord had the general right to the coals under the new land ; as to which they said that this was the first instance in which it had ever been contended, that after a clear title to a freehold of inheritance in land has been proved in the plaintiff through a long series of conveyances, unfettered by any exception, it is open to the defendant not to controvert that title, but to set up a presumptive exception to it by means of evidence of general usage and reputation only. It is a general rule of law that he who is the owner of the soil is entitled to all the profits arising from it, which include as well mines as every other parcel of the land (*b*) ; and though it may be admitted that when a freehold is granted, exceptions and reservations may be made in that grant, so as to limit the operation of the general rule of law, yet that necessarily implies that such exceptions and reservations must be made at the time of the grant ; nothing less, therefore, than the existence of some deed containing the exception insisted upon, or probable evidence that it once did exist, though it is now lost, can be sufficient to establish a right derogatory to that freehold title which is derived to the plaintiff by grant. No deed of that sort was attempted to be proved, nor any evidence offered to shew that it ever had existence ; and if it had, it would be most extraordinary that no traces of it should remain with the *Saville* family : the first mention of any express claim on their part to the coals within the new land is

(*b*) *Co. Lit.* 4, *b*.

in the lease of 1806 to *Aydon* and *Elwell*; and even admitting that such a claim may be inferred from the general terms of demise used in the prior leases to the *Woodheads*, still those leases go no farther back than 1692, whereas the plaintiff's title to the freehold is deduced from conveyances of a much earlier date, and which are evidence of an immemorial conveyance of the land as freehold, without any exception or reservation whatsoever. To encounter such a title, therefore, something more than presumption arising from the mere evidence of usage and reputation ought to be required, especially where that presumption might have been fortified by some proof of the deed, if any such ever existed. As to the evidence respecting the sale of the land in question by *Mortimer* to *Hurst* at a valuation which did not include the minerals, all inference arising from that circumstance to the prejudice of the plaintiff's title is rebutted by the words of the conveyance itself to *Hurst*, which expressly grant to him "all mines." [Lord *Ellenborough* C. J. observed that the word "coals" was not in the deed.] Upon the other point, viz. whether the plaintiff's tenement was within the new land, it was contended that the reservation of 1*s.* lord's rent in the deed of 1655, as well as that of 8*d.* tithe-money, which though not perhaps a modus, was evidence of a constant uniform tithe-payment, concurred to shew it old land; which was confirmed by this circumstance, that although the lord's tenants had searched for coal indiscriminately within the new land, they had not in any one instance exercised this right under the plaintiff's tenement. At all events it cannot be said that there was not evidence for the plaintiff, upon which the jury might deliberate and decide as they have done.

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Clayton Serjt. and *Holroyd*, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. The only evidence on the part of the plaintiff to resist the strong body of proof adduced by the defendant in support of the lord's right to the coal within the new land, was the presumption of law arising from his being the freehold tenant of the lands under which the lord's right was said to extend. But it is of universal experience that one person may have in him a freehold title to land, whilst another has an exclusive right to the mines under it, and this is by no means an uncommon case in the northern counties. The only material observation on the defendant's case is, that there do not appear to be any documents to shew how or when the right or reservation now claimed by the lord commenced; but that such right or reservation as to the new land did exist, stands not only on evidence of one or two instances of its exercise, but all the evidence proves that there has been an uniform exercise and enjoyment of it as far back as living memory will reach, first in the *Woodheads*, and afterwards in succession by *Aydon* and *Elwell*, who were the lessees under the lord; and there is not a scintilla of proof on the other side that it was ever interrupted. That to which the evidence of reputation was applied was that to which it always is applied in such cases, namely, as to the limits of the *new* land, and the general right of the lord over it. Indeed the general right of the lord over the new land has not been questioned; it has only been contended that there is no proof of any exercise of it within the particular land in question: but it may be observed that this is not a right, like some others, of a nature which makes it likely to be exercised

on the same spot at repeated intervals of time, but when once acted upon is more likely to be confined to the same spot until the subject matter is exhausted ; it cannot therefore be expected that it should be proved to have been exercised in every place to which it may extend, for that would be proving a right to a thing which had ceased to be of any value. If it had been before exercised on the lands in dispute, there could have been no question : but the evidence of the general indiscriminate exercise of it over the new land does apply by shewing that every part of the new land lies within the general ambit of the lord's right. The same objection might as well be made in the case of an encroachment on a waste. It might not be proved that any acts of ownership had been exercised by the lord upon the very spot, but shewing acts of ownership upon other parts within the general ambit of the waste has always been deemed sufficient. There is therefore nothing in that objection. There is however evidence applicable to the particular spot in the circumstance that took place upon the sale from *Mortimer* to *Hurst*, which strongly marks that the tenant at that time considered his interest not to go beyond the surface. As to the reservation contained in the deed of 1655 under the term of tithe-money, if it could be considered as a modus applicable to the particular tenement, it would be undoubtedly strong evidence for the plaintiff : the term however is ambiguous, and may perhaps be more properly applied to a composition real portioned out, than to a particular modus. Without therefore anticipating the result of another trial, I think it is fit that this case should be again submitted to another jury, who may appreciate the weight of it more justly and considerately. The evidence quoad the enjoyment is all one way : on the other hand, the presumption

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in favour of the plaintiff's title is strong until encountered by evidence, but it seems to me that it has been encountered in the strongest manner. The lord's right is evidenced by shewing that the same right was exercised by him over other lands similarly circumstanced.

GROSE J. agreed.

LE BLANC J. The Court in determining that there should be a new trial in this case do not mean to withdraw the decision of the question from the jury, but only to submit it to the consideration of another jury. There is no rule that the Court will not grant a new trial on a question of fact where there has been evidence given on both sides, but only where the evidence on one side does not preponderate. But where the Court see such a preponderance against the verdict, they are in the habit of sending the case back to another jury.

BAYLEY J. There is no contrariety of evidence in this case: the right to the surface was clearly in the plaintiff; and the evidence was extremely strong to shew that the coal within the new land belonged to the lord. Then as to whether the plaintiff's land was subject to this claim, I would only ask the former possessor of the same land what the lord's right in it was: and I find that in 1789 he sold this land, and was contented to take for it 140*l.*, when the man who valued it for him thought it worth 340*l.*, including the coal; which would have been foregoing nearly three-fifths of its actual value, provided he was entitled to the minerals. That is strong evidence therefore to shew that both the seller and purchaser considered that they were bargaining only for the surface.

To give effect to the observation that the conveyance between them included mines, it would be material to shew, if it could be shewn, that 140*l.* was a compensation for the minerals, otherwise to be sure the import of the evidence is strong the other way.

Rule absolute on Payment of Costs.

Clayton Serjt. and *Holroyd* prayed that it might be without costs, but the Court said that it was not reported by the learned Judge to be a verdict so clearly against evidence, as to induce them to depart from the general rule.

SNAITH and Others *against* *MINGAY* and Others.

Friday,
Jan. 29th.

THIS was an action brought under an order of the Court of Chancery against the defendants as indorsers of four bills of exchange, in which the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

Prior to and during the time when the bills were drawn and negotiated in manner hereinafter mentioned, *H. A. Bayley*, *Charles Cotterell*, and *Cornelius Lowe Wallace*, carried on, as partners, at *Waterford* in *Ireland* (where *Bayley* and *Cotterell* resided), the trade of provision merchants under the firm of *H. A. Bayley* and Co. *Wallace* likewise carried on upon his separate account and in his own name in *Wood-street* in *London*, where he resided, the trade of a dealer in bacon, and also transacted the business of the firm of *H. A. Bayley* and Co.; but it was covenanted by the articles of partnership between the partners that *Wallace* should neither draw,

Where partners resident in *Ireland* signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to *B.* in *England*, for his use, who filled up the blanks and negotiated it: Held, that this was to be considered a bill of exchange by relation, from the time of the signing and indorsing in *Ireland*, and consequently that an *English* stamp was not necessary.

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accept, or indorse bills in the name of the partnership firm. A short time previously to the respective dates of the bills *Bayley* and *Cotterell*, or one of them, at *Waterford*, signed and indorsed, in the name of the firm, copper-plate impressions of four bills of exchange, leaving blanks for the date, sums, times when payable, and names of the drawees, and transmitted them in that state to *Wallace* in *London*, to be used by him for his individual accommodation in his separate trade of a bacon merchant, and not upon the partnership account. The blanks were afterwards filled up by *Wallace* in *London*, who there negotiated the bills; the first of which was dated *Waterford*, 3d *April* 1810, and was drawn by *H. A. Bayley* and Co. upon *Rose* and Son in *London*, payable 90 days after date to the drawer's order. The other three bills were not materially different, varying only as to the days of their date, the sums, and times of payment, and the names of the persons upon whom they were drawn. The stamps upon these bills were appropriate *Irish* stamps for the respective sums inserted therein, and were upon the copper-plates when transmitted from *Ireland*, but were not legal stamps for bills of exchange drawn in *England* of the same respective value. After the blanks were filled up the bills were duly accepted by the several persons to whom they were addressed, and were afterwards indorsed by the defendants, at the request and for the benefit of one *Edmund Cotterell*, by whom they were duly indorsed and negotiated to plaintiffs, who discounted the same in their business as bankers for a valuable consideration, without any knowledge of the circumstances under which the bills were drawn or filled up, or any other circumstances connected with their antecedent negotiation. The bills were respectively

spectively presented to and dishonoured by the acceptors when they became payable, and due notice thereof was given to defendants, who refused payment, on the ground that the bills were void for want of having proper *English* bill stamps affixed to them.

If the Court should be of opinion that the plaintiffs are entitled to recover, then the verdict to stand; otherwise to be set aside, and a nonsuit entered.

Nolan, for the plaintiffs, contended that the bills were not void for want of an *English* stamp. The question depends on stat. 48 Geo. 3. c. 149. §. 2., which was the stamp act in force at the time when these bills were drawn; and that question is, whether these bills can be considered as inland bills within the meaning of that statute. Now in order to constitute an inland bill, the bill must not only be payable, but must also be drawn in *England*; whereas here the bills were drawn in *Ireland*, at the time when they were signed by *Bayley* and *Cotterell*. The mere signature of a party to a bill amounts to an obligation upon him to pay the bill, although it is in blank at the time of his signature. Accordingly, in the case of *Russell v. Langstaff* (a), where it was objected that the indorsement having been made on a blank bill, it was to be considered as no bill, and it was so ruled at Nisi Prius, and the plaintiff was nonsuited upon the objection; the Attorney-General, who was afterwards to have supported the nonsuit, thought the point too clear for argument, and was obliged to abandon it; and Lord *Mansfield* C. J. observed, that the indorsement on a blank note was in the nature of a letter of credit for an inde-

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(a) *Doug.* 513.

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finite sum. So here, the signature in *Ireland* on the blank bill was equivalent to drawing a letter of credit in *Ireland*. In *Bayley* on Bills (a) it is laid down, on the authority of *Collis v. Emett* (b), that if a person sign his name upon a blank paper stamped with a bill stamp, and deliver it to another person to draw such bill as he may choose thereon, he is the drawer of any bill to which the stamp is applicable which such person shall draw thereon; and accordingly in *Collis v. Emett*, where the defendant had so signed his name, and delivered it to *Livesay* and Co., who drew for a large sum, and transferred it to the plaintiff, the Court gave judgment for the plaintiff on a count alleging that the defendant drew the bill: the signature, therefore, is the principal act, and the subsequent acts are only incident and referable to it. Here the filling up the blanks by *Wallace* in *London* had reference to the authority given to him by *Bayley* and *Cotterell* in *Ireland*, and, when completed, had effect from the time of their signature; and this authority was not indefinite, but was necessarily limited by the amount of the stamp at the time of the signature, the stamp laws not allowing of any re-stamping of a bill of exchange. If then the bills are to be considered as virtually drawn in *Ireland*, it is clear that they ought to bear the stamp required by the law of that country, in order to make *Bayley* and *Cotterell*, the drawers, liable; for without such a stamp, according to the cases of *Alvez v. Hodgson* (c), and *Clegg v. Levy* (d), they could not have been sued upon the bills. The plaintiffs, however, are not driven to the necessity of maintaining that these bills were drawn in *Ireland*, although, on the authority of *Collis v. Emett*,

(a) P. 14. 2d edit.

(b) 1 H. Bl. 313.

(c) 7 Term Rep. 241.

(d) 3 Campb. 166.

that position might be maintained : it is sufficient for them that the bills were not drawn in *England*.

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Scarlett, contra. It may be admitted that as far as the signature of the drawer is essential to constitute a bill of exchange, the bills in question were perfect; but there are other requisites equally essential with that of the signature of the drawer, such as the date, sum, and the name of the drawee, the want of any one of which will render the bill incomplete and of no effect. It becomes a bill of exchange only from the time when all these requisites are perfected, and must therefore have a stamp applicable to that time and the place where it so becomes a bill. Here the signature alone was made in *Ireland*; the other requisites were completed in *England*; the bills, therefore, are to be considered as *English* bills, requiring an *English* stamp; for the law requires a stamp on a bill of exchange, not on a blank paper. The signature of *Bayley* and *Cotterell* was in the nature of a power of attorney to *Wallace* to draw bills in their names, which he executed in *England*, and the bills were first issued there for his accommodation; so that the transaction was altogether limited to *England*. It was in effect the same as if *Bayley* and *Cotterell*, instead of transmitting their signature, had sent an order to *Wallace* to subscribe their names to the bills in *London*; in which case, if he had so done, the bills would unquestionably have been inland bills within the meaning of the statute. But the circumstance of their being dated at *Waterford* will not alter their nature, if in effect they first assumed the character of bills of exchange in *England*. The case of *Russell v. Langstaff* only decides that when a bill of exchange has received its formal completion, so as to take effect

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effect as a bill, it will bind a person who has previously indorsed it when in an imperfect state. The question here is not whether *Bayley* and *Cotterell* may not be responsible upon their signature, but at what time these bills became bills of exchange.

LORD ELLENBOROUGH C. J. It is probable, that sitting at nisi prius I hesitated whether this instrument could in strictness be considered as a bill of exchange, until the name of the drawee was supplied. The question now is, when that name was supplied, whether it did not become by relation a bill of exchange from the time when the signature of the drawers, which was the obligatory act upon them, was first put to it. What is this case? A merchant resident in *Ireland* sends to *England* certain bills of exchange drawn on proper *Irish* stamps, and in that respect he limits the authority of the person for whose benefit the bills are transmitted. These bills are signed with the name of the merchant in *Ireland*, indorsed with his name, and dated from a place in *Ireland*; and are transmitted to the correspondent in *England* with authority to him to fill up the remaining parts of the instrument. The moment the blanks are filled up, does not the instrument by relation become the bill of the party in *Ireland*, as much as if it had been drawn in all its particulars with his own hand? It was so held in *Russell v. Langstaff*. In that case, at the time of the indorsement it was not a bill of exchange; but the moment the other parts were filled up by an authorized agent, then it became the bill of the party, and was considered as fit to be declared on as such. I remember the case at *Durham*, and afterwards in this court. It was asked upon that occasion how the allegation in the declaration "that the defendant

defendant *afterwards* indorsed the said bill," could be sustained. But the Court resolved that they would so adjust the acts of the party as to give effect to the intention, and for that purpose held, that an indorsement, which was prior in point of time to the drawing, was to be considered in law as posterior. Here the relation back is made to a time when a valid and obligatory authority, viz. the signature of the drawer, was impressed on the bill, which in *Collis v. Ematt* was considered as a sufficient drawing; and it is quite immaterial, whether the filling up the blanks, which afterwards made it a perfect bill of exchange, was done by a mere agent, or by an agent who had an authority coupled with a discretion. It is not stated that there was any fraud on the stamp laws of either country. The instrument, therefore, must be considered as a bill of exchange drawn in *Ireland*, and not as drawn in *England*.

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GROSE J. The question is, whether this is to be considered as an *Irish* or an *English* bill of exchange. The case seems to me to be this: a piece of paper signed by a person in *Ireland* is given for the purpose of being filled up and operating as a bill of exchange; and although it was imperfect at the time when it was signed, yet when it became perfect by being filled up, it operated as a bill of exchange from the time when it was signed and intended to have such operation. I consider it therefore as an *Irish* bill of exchange.

LE BLANC J. This is an action against the indorsers of a bill of exchange; to which it has been objected, that the bill is void for want of a proper stamp. That brings it to the question, whether this is an *English* bill.

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MINGAY.

The party drawing the bill was a person *bonâ fide* resident in *Ireland*, and no fraud is stated in the case. It does not appear that he drew the bill in *Ireland* with any fraudulent intent of evading the stamp laws, or that he went to *Ireland* for that purpose; but the case states that being resident there he drew the bill, i. e. subscribed his name in the character of drawer, and afterwards as first indorser, on a paper properly stamped according to the revenue laws of *Ireland*, and having every mark to designate it as a bill of exchange. It is not a question, whether it was then perfected as a bill of exchange. It certainly was designated as such. The party in *Ireland* then sends it over to this country with authority to his correspondent here to insert the day of the date, the sum, and the name of the drawee. It comes here, therefore, as an incipient bill of exchange, and so far having the essence of a bill, as it has the name of the drawer and first indorser upon it; and afterwards the party to whom it is sent, and who has authority given him by the signature, addresses it to a third person as the drawee, and supplies the sum and date. Whether this was a perfect bill in *Ireland* is not so much the question as whether it was a bill drawn in *England*. I call it an incipient bill, which by the subsequent acts was made a perfect one: for the cases shew that when a signature is once written to a paper which is intended to have the operation of a bill of exchange, it becomes such when perfected from the time when it was signed, so as to support an allegation that the party either drew or indorsed the bill (a). Here the transaction is the same as if the party in *Ireland* had desired his correspondent in *London* to fill up a bill of exchange, and send

(a) *Ruffell v. Langstaff, Collis v. Emett.*

it over to him, in order that he might sign it: it differs only in this, that instead of having a bill sent to him already filled up, and then signing his name to it, he signs his name first, and then sends the bill to his correspondent.

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 SNAITH
against
 MINGAY.

BAYLEY J. The only act to pledge the credit of the house of *Bayley and Co.* was the signature in *Ireland*. Suppose the person subscribing his name as drawer had died whilst the bill was on its passage, and afterwards the blanks had been filled up and the bill negotiated to an innocent indorsee; I should think that in that case the representatives of the party signing the bill would have been liable. This shews, that when the whole is filled up, it has reference to the time of the signature, which in this case was made in *Ireland*.

Judgment for the Plaintiffs.

DOE, on the Demise of BISH, *against* KEELING.

Friday,
 Jan. 29th.

THIS was an ejectment brought for a messuage and garden, on a proviso contained in a lease, for re-entry for the non-performance of covenants. Plea, not guilty.

At the trial before Lord *Ellenborough* C. J. at the *Surrey* assizes 1811, the jury, under the direction of his Lordship, found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

By a lease dated the 8th of *June* 1809, and made between *Thomas Bish* the younger (the lessor of the plaintiff)

Where a lessee of a house and garden for term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business what-

soever, &c. without the licence of the lessor, &c." and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises: held that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants.

of

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Lessee of
BISH,
against
KEFLING.

of the one part, and Lady *Georgina Anne Mac Neill* of the other part, *Thomas Bish* demised to *Georgina Anne Mac Neill*, her executors, administrators and assigns, the messuage and premises in question for the term of 14 years from the 25th of *March* then last past at the yearly rent of 50*l.* The house is situated on *Richmond Green*, and the lease contained, amongst others, the following covenant: “ And the said *Georgina Anne Mac Neill*, for herself, her executors, administrators, and assigns, doth further covenant, promise, and agree, to and with the said *Thomas Bish*, his executors, administrators, and assigns, that she the said *Georgina Anne Mac Neill*, her executors, administrators, and assigns, shall not nor will during the said term hereby granted erect or build any new edifice or building, edifices or buildings, on the piece or parcel of ground and premises hereby demised, or any part thereof, and shall not nor will at any time or times during the term convert the same premises, or any part thereof, or permit or suffer the same to be converted into or used as and for a shop or shops, or to have any mark or shew of trade or business thereon, or on any part thereof, *nor use or exercise, or permit or suffer to be used or exercised in or upon the same premises, or any part thereof, any trade or business whatsoever, or permit or suffer any sale or sales by public auction in or upon the said demised premises, or any part thereof, without the licence or consent of the said Thomas Bish, his executors, administrators, or assigns, for these purposes respectively first had and obtained.*”

On or about the 24th of *June* 1809 Lady *Mac Neill* assigned her interest in the premises to the defend-

ant, who in pursuance of such assignment entered upon and took possession of them.

The defendant is a schoolmaster, and immediately upon taking possession of the premises opened a school in the house, and published and distributed hand-bills containing the particulars of the school, the nature of the instruction furnished, and the terms upon which pupils were boarded and educated by the defendant. No licence or consent was granted by *Thomas Bish* to Lady *Mac Neill* to permit or suffer the defendant, nor to the defendant, to open the school in the house. There are from 50 to 60 boys in the school, but no board or sign whatever is affixed to the house or premises, nor is there any mark or shew of trade or business on the premises, or any part thereof.

The question for the opinion of the Court is, Whether the keeping and carrying on the said school by the defendant upon the premises is a breach of the covenant or not. If the Court shall be of opinion that the keeping and carrying on the said school is a breach of the covenant, the verdict is to stand. And if the Court shall be of opinion that it is not a breach of the covenant, a nonsuit is to be entered.

Bolland, for the lessor of the plaintiff, adverted to the general rule for the construction of covenants, viz. that they shall be construed according to the intention of the parties covenanting; and if there be any ambiguity, the covenant shall be taken most strongly against the covenantor. He then contended that it was the intention of the original parties to this deed that the house should continue a private house; the fulfilment of which intention the rank and station of the lessee secured to the

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lessor, so long as she remained tenant. The question then is, whether construing the words "trade or business," according to the intention of the parties, they do not comprehend the occupation of a schoolmaster. It has indeed been considered that a schoolmaster as such (*a*) is not a trader within the bankrupt laws; but the words "trade or business" used in this covenant are not intended to be confined within so narrow a construction: indeed, the covenant is expressly extended farther, viz. to any *species* of trade or business. Although the business of a schoolmaster is commonly denominated a profession, that is only as denoting it to be a business of a more liberal description; but it may nevertheless be deemed in many respects very similar to a trade; and especially in respect of the inconvenience likely to result to the owner of the premises within which such a business is carried on, which may be as great as that which many trades would occasion.

Adolphus, contra, maintained that this was merely a question of construction, and not what was the probable expectation of the lessor; and that although the rule for the construction of covenants was, that they are to be taken most strongly against the party covenanting, yet there was another rule, which applied to this case, viz. that a party shall not incur a forfeiture without strict words imposing such forfeiture. The words of this covenant, upon which the question turns, are "trade or business;" the first of which is a term of a specific meaning, the latter of a general one. But it has been laid down in *The Archbishop of Canterbury's case* (*b*), and in *The Countess of Bridgewater v. The Duke of Bolton* (*c*), that

(*a*) *Skinner*, 292. 3 *Mod.* 330. (*b*) 2 *Rep.* 46. (*c*) 6 *Mod.* 107.

where

where a specific term is used in the first place, it shall receive no extension by a subsequent general term. Here then the preceding word "trade" shall not be extended by the subsequent word "business," according to the rule laid down in those cases; and such a construction is fortified in this case by the words being used in conjunction with the words "shop, or shew of trade or business;" which shew that the intention of the parties was to prohibit only such business as could not be carried on without a public exhibition. If this is to be considered as a trade, taking one or two pupils would be equally within the covenant, which would be a most inconvenient construction.

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Lord ELLENBOROUGH C. J. I own I have no doubt that this is a business within the meaning of the covenant, and one which is likely to create as much annoyance as can be predicated of almost any business. It surely cannot be contended, that the noise and tumult which sixty boys create, are not a considerable annoyance, as well to the neighbourhood as to the house, from which any landlord may fairly be supposed to be desirous of redeeming his premises; and the exhibition too of the boys may be said somewhat to resemble a shew of business, within the terms of the covenant. The intention of the covenant was, that the house should not be converted to any purposes which might be likely to annoy the neighbourhood, and by that means to depreciate its value at any future period, when another tenant might be required. But a business of this kind would necessarily produce inconvenience to the neighbourhood, both by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons,

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such as the parents and friends of the children ; and it is therefore that species of business which would have most prominently offered itself as fit to be excluded. It is certain that the words of the covenant in some places relate to that species of trade which is carried on by means of sale and an open exhibition of trade ; but can we say that the word “ business ” does not comprize such an occupation as the present ? It seems to me that we cannot ; and as to the intention, if the party had it in his contemplation either to secure his own privacy or that of the neighbourhood, there can be no doubt that this is a species of business that he would have particularly excluded. He has not done so by express words ; but still the words are sufficient, and the intention is clear.

GROSE J. I think this was a wise provision on the part of the landlord ; there is not any business more likely to injure a house than that of a schoolmaster ; and it was proper, by way of securing the neighbourhood from annoyance.

LE BLANC J. I do not think that the meaning of the parties can be fairly confined to trade, because they have used in addition the word “ business ; ” which must be intended of something not falling within the description of trade. The question then is, whether a school, to which the public at large are invited to send their children, does not fall within the words of the covenant. I think it does ; and if so, there is no doubt it falls within the mischief intended to be provided against.

BAYLEY J. concurred.

Judgment for the plaintiff.

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The KING *against* The Mayor and Citizens of
CHESTER.

Wednesday,
Feb. 3d.

PARK moved for a mandamus to the mayor and citizens of *Chester*, to hold a general assembly for the election of 24 aldermen and 40 common-councilmen, and to proceed to such elections. The question meant to be raised was whether the elections of these officers ought to be annual. By a charter of incorporation granted by King *Henry* the Seventh, in the 21st year of his reign, to the citizens and commonalty of *Chester*, and confirmed by a charter in the 16th of *Elizabeth*, it was granted (inter alia) in the following terms: "Volumus etiam damus & concedimus pro nobis & heredibus nostris præfatis civibus & communitati heredibus & successoribus suis, quod ipsi et successores sui in perpetuum *singulis annis successivis* viginti quatuor concives civitatis prædictæ in aldermannos nec non quadraginta alios cives ejusdem civitatis pro communi consilio civitatis illius eligere facere et creare possint." Then followed a provision for electing a recorder, and there were other provisions also for electing annually a mayor and the other corporate officers. The only instances of usage which were set forth in the affidavit in support of the motion, were in the year 1693, and the two following years, in each of which an election of 40 common-councilmen was stated to have taken place. The affidavit also set forth a return made by the mayor and citizens to a mandamus granted by this Court in the year

Where a charter of incorporation of *H. 7.*, granted to the citizens and commonalty in these words: "Quod ipsi & successores sui in perpetuum *singulis annis successivis* 24 concives civitatis in aldermannos, nec non 40 alios cives ejusdem civitatis pro communi consilio civitatis illius eligere facere & creare possint;" and it appeared that in the year 1693 and the two following years, successive elections of the 40 common-councilmen had been made, since which time the usage had been not to elect the aldermen or common councilmen annually; the Court refused a mandamus which was applied for in order to raise

the question against the usage whether the elections of those officers ought to be annual, there being another remedy open to the parties making this application.

r813.

THE KING
 against
 THE MAYOR
 AND COUNCIL OF
 CHESTER.

1693, on the application of *R. Brett* and eight others to be restored to the office of common-councilmen, to which the mayor and citizens made a return that it was granted by the said charter of *H. 7.* that the citizens and commonalty *should or might* annually elect 40 citizens for the common council, and that the said *R. Brett* and the eight others were duly elected and continued in the office of common-councilmen for one year, and at the expiration of that year other citizens were elected in their stead; which return as was alleged was never falsified or vacated.

To a question put by *Le Blanc J., Park* admitted that the usage with respect to the election of aldermen and common-councilmen since the times mentioned in the affidavit had been contrary; but he relied on the express words of the charter of *H. 7.*, which charter he said had been confirmed in *Rex v. Amery (a)*. [Lord *Ellenborough C. J.* The words of the charter are not compulsory; they are *eligere possint, i. e.* they have power, but are not compelled to elect. It is an extremely unusual practice, I believe, in corporations, as founded either upon usage or charter, to elect all the corporate officers annually.] It is so at *Scarborough*, and the practice was upheld by mandamus from this court (*b*).

LORD ELLENBOROUGH C. J. Besides the *Scarborough* case, where the usage prevailed, there was another case I believe in the time of Lord *Kenyon*, where an usage had prevailed I may say almost against the words of the charter; but the Court would not interfere against a

(a) 2 *T. R.* 515. 4 *T. R.* 122

(b) *Sir.* 1120. The case of the Corporation of *Scarborough*.

long continued usage upon the words of a charter which were in any degree doubtful. Here the usage has been uniform for upwards of a century, and is not inconsistent with the words of the charter. I am not therefore for disturbing it at this day by granting the rule, especially where another remedy is open to the parties.

Per Curiam (c),

Rule refused (d).

(c) *Grose* J. was absent, and continued so during the remainder of the term.

(d) *Str.* 625. *Foot v. Prowse.*

HASLOPE *against* THORNE.

Wednesday,
February 3d.

UPON a rule nisi for delivering up the bail-bond to be cancelled, and entering a common appearance for the defendant, upon the ground that the affidavit to hold to bail did not contain the deponent's true place of abode (a), the affidavit ran thus: "*A. B.*, clerk to *Launcelot Haslope*, of *America-square*, in the city of *London*, ship-insurance agent, maketh oath and faith," &c.

In an affidavit to hold to bail, the plaintiff's clerk may state his place of abode to be the office where he is employed the greater part of the day, though at night he sleeps at another place.

Abbott, who opposed the rule, relied on this being the usual form of such affidavits, upon which the Court had been in the habit of acting for a length of time.

Bowen, in support of the rule, contended that place of abode meant the place where the person usually slept,

(a) By rule of *Mich.* 15 *Car.* 2. it is ordered that the true place of abode and the true addition of every person who shall make affidavit in court here, shall be inserted in such affidavit.

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HASLOPE
against
THORNE.

which he said in this case was at *Camberwell* and not in *London*.

LORD ELLENBOROUGH C. J. said that the words "place of abode" did not necessarily mean the place where the deponent sleeps; that the object of the rule of court was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he was employed during the greater part of the day, and not the place whither he retired merely for the purposes of rest. It is the settled form of almost all the affidavits swearing to service.

LE BLANC J. added, that it had been the constant practice to receive affidavits in this form.

Per Curiam,

Rule discharged.

Thursday,
Feb. 4th.

MILBORN *against* COPELAND.

A writ of error in parliament may be non prossed without carrying over the transcript to the court of error.

IN this case the defendant brought a writ of error returnable in parliament, and was thereupon ruled to transcribe, and he accordingly paid the transcript money, but the transcript was not carried over in the last sessions to the House of Lords. In this sessions the defendant was informed that the transcript was ready to be carried over; whereupon he non-prossed his own writ of error. A rule having been obtained for setting aside the judgment of non pros for irregularity,

Richardson shewed cause against it, contending that the defendant was at liberty, according to the practice, to non
pros

pros his own writ of error in this case, and he cited *Salt v. Richards (a)*.

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MILBORN
against
CORPESLAND.

Littledale, in support of the rule, urged that according to the case of *Salt v. Richards*, if the defendant was at liberty to non pros his own writ without carrying over the transcript to the court of error, the plaintiff would thereby be deprived of his costs.

LORD ELLENBOROUGH C. J. It is the constant and established practice, and I find upon enquiry from the officers that the usage has prevailed without exception for 30 or 40 years.

LE BLANC J. added, that the same practice was allowed in the Exchequer Chamber.

Per Curiam,

Rule discharged with Costs.

(a) 7 *East*, III.

PRICE *against* HOLLIS.

Thursday,
Feb. 4th.

THIS was an action tried before *Chambre J.* at the summer assizes 1812, for the county of *Southampton*, for money had and received, and on an account stated. The object of the action was to recover the sum of 55*l.*, part of the money taken by the defendant (under-sheriff of *Hampshire*) as poundage on executing a writ of *elegit*. The defendant had taken poundage on the whole debt instead of computing it upon the annual value of the

Where two parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and con-

clusive, though it recommended the printed stat. to be compared with the parliament-roll before the matter was settled, under a doubt whether the statute was not misprinted.

estate

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 PRICE
 against
 HOLLIS.

estate extended, contending that although writs of *elegit* are mentioned in the recital of the 16th section of stat. 3 G. 1. c. 15., yet as they are omitted in the enacting part, the sheriff's right to full poundage under the former statute is not restrained by the 3 G. 1. It was proved that the parties had agreed that a case should be laid before a gentleman of the profession for his opinion, and that they would be bound by such opinion. The opinion was given by that gentleman in favour of the sheriff's claim, but he expressed a doubt whether the variance between the recital and the enacting part, in the latter of which writs of *elegit* are omitted, might be any thing more than a misprinting of the statute; and recommended that the printed statute should be compared with the parliament-roll before the matter was settled. It was contended that the under-sheriff had no right to the full poundage, but was restrained by the 3 G. 1. c. 15. s. 16., and that the opinion given was founded upon a misconstruction of the statute; and farther that as it was a doubtful and not a decisive opinion, the plaintiff was not bound by it, but was at liberty to litigate the question in this action. A verdict was taken for the plaintiff, upon an understanding that the defendant was to bring the matter before the Court; and accordingly in the last term

Gaselee obtained a rule nisi for a new trial, upon the point whether the opinion was final or not.

Pell Serjt. and *E. Larwes*, who shewed cause, maintained that the opinion was not final, inasmuch as it professed to doubt the accuracy of the words of the printed statute, and recommended a farther step to be

taken before the matter was settled, in order to remove that doubt, viz. the comparing the printed statute with the parliament-roll; and therefore until that comparison was made, the opinion rested upon an imperfect statement, and could not have a binding effect: and upon examination it might turn out that the printed statute was incorrect, and it was incumbent on the defendant to shew that the words of the statute on which he relied had not been misquoted.

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PRICE
against
HOLLIS.

But the Court (a) were clear that the opinion was positive and decisive, notwithstanding the recommendation that the parliament-roll should be searched. The parties had agreed to abide by that opinion, and when given it was in the nature of an award, and became final between them, and the Court would not look into it to see whether it was strictly right. If the statute was misprinted, it was incumbent on the plaintiff to shew that fact. Not having done so, it must be taken to be correct.

Rule absolute.

Gaselee was to have supported the rule.

(a) Lord *Ellenborough* C. J. had left the Court.

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Thursday,
Feb. 4th.

FALLICK *against* BARBER.

Where an advertisement respecting a stolen child promised a reward to the person who would give information wherethr child was, so as that he might be restored to his parents, and the plaintiff communicated to the defendant her suspicion where the child was, in order to put the matter into his hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of the defendant acting upon the plaintiff's communication; Held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it.

THIS was an action for money lent, money paid and expended, money had and received, and on an account stated, which was tried before *Chambre J.* at the last assizes for the county of *Southampton*.

The object of the action was to recover a reward, or a portion of a reward of a hundred guineas, which had been offered by public advertisement for the discovery of a child that had been stolen from its parents, which reward had been paid to the defendant. The advertisement, dated the 15th *December* 1811, was intituled, "100 guineas reward;" and after the usual description of the child and the woman with whom it had been last seen, concluded thus,

"Whoever will give information where the child is, so as that he may be restored to his parents, shall receive the above reward of 100 guineas, to be paid (on the child being restored), by the churchwardens of the parish of *Saint Martin Ongar*, 29, *Saint Martin's-Lane*, *Canon-street*." The child in question was at this time in the custody of a *Mrs. Magnefs*, at *Gosport*, where the plaintiff and defendant resided. The plaintiff having been employed to work for *Magnefs*, observed the child at her house, and knowing that she (*Magnefs*) had never had a child, communicated to the defendant her suspicion that this might be the stolen child, at the same time observing that she had told this to the defendant in order to put it into his hands for his benefit, if he chose to run the risk; that he was to do as he liked, but as she apprehended it would injure her, she gave

him the information under a pledge of secrecy. In consequence of the defendant's exertions the child was restored to its parents, and the defendant received the reward of 100 guineas from the magistrate at *Gosport*, to whom it had been transmitted. There was no doubt that the defendant's exertions were the immediate cause of the discovery; and *Chambre J.* in his observations to the jury, expressed an opinion that the plaintiff's communication of her suspicion to the defendant, under the circumstances and in the way in which it was made, was not such information as the advertisement required; but they found a verdict for the plaintiff with 30*l.* damages.

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 FALICK
 against
 BARBER.

A rule nisi having been obtained by *Gaselee*, in last *Michaelmas* term, for a new trial,

Pell Serjt. and *Bayly* shewed cause, and contended that the jury by their verdict had decided that the plaintiff was the person who led to the discovery, and therefore in strictness she was entitled to the whole reward; but although the jury have given only a part, when they would have been authorized by law to give the whole, it does not therefore follow that it is competent to the defendant who wrongfully retains the whole, to impugn the verdict on that account. Perhaps indeed as there can be no doubt that the plaintiff contributed information material to the discovery, the verdict is maintainable as it stands, upon the same principle that an action is maintainable by one of several contributors to a sweepstakes against the stakeholder to recover the share of his contribution. Here the jury have found what share is due to the plaintiff; and if it appears that
 she

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—
FALICK
against
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she is entitled in equity and good conscience, at least to a portion of the reward, the Court will not disturb the verdict, according to the case of *Deerly v. The Dutcheffs of Mazarine* (a), *Edmondson v. Machell* (b), and *Cox v. Kitchen* (c), in which latter case the rule was laid down to that extent by *Buller J.*, even where the verdict is contrary to law.

Gaselee, contrâ, stopped by the Court.

LE BLANC J. (d). I think that there ought to be a new trial. It seems to be admitted that the verdict is against law ; and I do not accede to the proposition that it is agreeable to equity and good conscience, for it is clear that the plaintiff never meant to be the discoverer, on the contrary, she declared, that she was apprehensive it might injure her, and that she would put it into the defendant's hands for his benefit. On the part of the defendant there is not any undertaking, either express or implied, to allow the plaintiff a share of what he might recover ; indeed it is negatived by the case which states that it was told to him for his benefit. The plaintiff therefore is not entitled to any portion of the reward. I agree with the law as laid down by the counsel for the plaintiff, that if she had been entitled to the whole, I would not have set aside the verdict at the instance of the defendant, because a part only was given, but in my view of the case the plaintiff was not entitled to any part.

(a) 2 Salk. 646.

(b) 2 T. R. 4.

(c) 1 Bos. & Pull. 338.

(d) Lord Eilcalborough C. J. was absent.

BAYLEY J. The party promising to pay the reward, which consisted of one entire sum, could only be liable to one action at the suit of the person who gave the information whereby the child was restored to its parents. The plaintiff was not that person, she had given no such information to the party promising the reward, but only to the defendant, by whose exertions the child was restored; she therefore could not have maintained any action upon the original promise. Then as to her claim to contribution, it appears that she communicated her suspicion as a secret to the defendant, *for his benefit*, if he chose to run the risk, which she declined. It is impossible after this to say that the plaintiff has any right to call on the defendant for any part of the money.

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FALLICK
against
BARBER.

Rule absolute.

LANG and Another, Assignees of BAZELEY,
a Bankrupt, *against* **GALE.**

Thursday,
Feb. 4th.

ASSUMPSIT: the declaration stated that *Christopher Savile* was seised in fee of a messuage with the appurtenants, situate at *Oakhampton* in the county of *Devon*, as mortgagee thereof, subject to redemption by

The word month may mean lunar or calendar month, according to the intention of the contract-

ing parties: therefore where upon a sale of land on the 24th of *January*, it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, and the purchase to be completed on the 24th of *June*, making a period of precisely five calendar months from the date of the sale and conditions, the word months was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. The condition for delivery of the draft of the conveyance within three months, was not a condition precedent with respect to its delivery within the precise time.

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against
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the plaintiffs as assignees of *Bazeley*, on payment of 700*l.* and interest: that the plaintiffs were entitled to the equity of redemption, and the premises were in the occupation of *Bazeley*: that *Savile* and the plaintiffs being so seised, on the 24*th* of *January* 1811 exposed the fee-simple of the premises to sale by auction on the following terms: (inter alia) That an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, and if he should think proper to take counsel's opinion, or compare the abstract with the title deeds, he should be at the expence thereof, and should return the abstract with or without his approbation at the end of two months from the date thereof: that a draft of the conveyance should be delivered to the purchaser or his attorney *within three months* from the date thereof, and should be delivered to Mr. *Collins* within four months from the date thereof, and that the remainder of the purchase-money should be paid on the 24*th* of *June* then next, when the purchaser should receive his conveyance duly executed by all parties, to be prepared by Mr. *Collins* at the expence of the purchaser. That the purchaser should be in the perception of the rents and profits of the premises from the 24*th* of *June*, on payment of the remainder of the purchase-money, and not otherwise: that if the purchaser should neglect to comply with all or any of the conditions, the deposit-money should be forfeited, and the sellers at liberty to resell the premises, &c. The declaration then stated, that by agreement in writing between the plaintiffs and the defendant, the defendant agreed to purchase the premises at the price of 1450*l.*, subject to the said conditions, and the plaintiffs agreed to sell the same to him at the said price and on the same conditions. It then averred

averred mutual promises of performance, and that afterwards within a fortnight from the date of the said conditions, an abstract of the title of the plaintiffs and *Savile* to the premises was delivered by the plaintiffs to the defendant, and afterwards, *within three months of the date of the conditions, a draft of a proper conveyance of the premises was delivered by the plaintiffs to the defendant's attorney*; and the plaintiffs went on to aver that from thence until and on the 24th of *June* they were ready and willing to have performed the rest of the conditions on their part to be performed, of which the defendants had notice. The breach assigned was that the defendant, after the delivery of the draft and before the 24th of *June*, by his attorney returned the same, and on the 24th of *June* refused to complete the purchase, &c. The defendant pleaded the general issue.

At the trial before *Chambre J.* at the last assizes at *Exeter*, it appeared that the premises were sold by auction to the defendant on the 24th *January* 1811 at the sum of 1450*l.*, who then subscribed his name to the contract; that on the 7th of *February* following, an abstract of the title was delivered to him, which after some hesitation he received, and which being returned on the 9th by the defendant's attorney with an indorsement made thereon, a fuller abstract was furnished him. The draft of the conveyance was *delivered on the 24th of April* 1811, and on the 30th the defendant declared that he would have nothing more to do with the contract, and was unable to perform it. It was objected that the plaintiffs could not maintain the action, not having complied with the terms of the conditions, by delivering the draft of the conveyance within the time stipulated; viz. three months from the date, which date was the 24th

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of *January*. The delivery was on the 24th of *April*, three calendar months after the date; but it was contended, that the computation was to be made by lunar months. This objection was saved for the opinion of the Court, subject to which a verdict was given for the plaintiffs. *Pell* Serjt. accordingly in the last term obtained a rule nisi for entering a nonsuit.

Lens Serjt., and *Bayly*, now shewed cause, and admitted the general rule that in legal proceedings the term month is to be intended lunar and not calendar, the reason of which is this, that the common law computes time according to the lunar month; but in ecclesiastical matters the computation is by the calendar month; and therefore where a statute speaks of six months, in a matter which concerns ecclesiastical proceedings it shall be computed by calendar months (*a*), and so the words tempus semestre in the stat. of *West.* 2. c. 5. concerning quare impedit were computed (*b*). This shews that the word month may be understood either as lunar or calendar according to the subject-matter to which it refers, or the understanding of the parties using it. The question then is, whether by reference to the whole context of this agreement it does not appear to be the intention of the parties that it should be construed as calendar. Such a construction arises almost of necessity out of the contract; for it is to be completed, according to the limits prescribed by the parties themselves, on the 24th of *June*, which is precisely five calendar months from the day of the sale. The parties therefore must have had it in their contemplation to regulate the inter-

(*a*) 2 *Roll. Abr.* 521. 51. *Hob.* 179. *Copley v. Collins.*

(*b*) 6 *Rep.* 61. *Cat&by's case.*

mediate periods of its performance by the same standard which they have chosen for its final completion, and accordingly when they used the word months simply, to have thereby intended calendar months. But supposing this a wrong construction of the word, and therefore that the delivery of the draft of the conveyance on the 24th of *April* should be deemed out of time, still the contract subsists, unless it can be shewn that a delivery within the specified time was a condition precedent. There are no words of condition annexed to this particular stipulation, and it does not seem essential to the nature of this contract that it should be construed as such, and the party by not objecting to the delivery at the time, has shewn that he considered it otherwise; the substance of the stipulation was only to secure to the purchaser a delivery within a reasonable time. In *Hall v. Cazenove (a)*, where a charter-party contained a covenant by the owner that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight, it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned: that case, therefore, is a strong authority in favour of the plaintiff. At all events the defendant has dispensed with the performance of the condition, by not objecting at the time when the draft was delivered to him.

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Pell Serjt., and *Gifford*, contra, denied the inference attempted to be raised on the other side from the circumstance of the parties having fixed upon the 24th of *June*

(a) 4 *East*, 477.

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as the final limit of the contract ; indeed, they contended that the inference was directly the other way, because it was clear by fixing that period, that where they meant calendar months they have so expressed it. If the context is to be resorted to in order to explain the meaning of the word months, it is observable that they have limited the performance of one of the conditions to a fortnight, a period which has relation only to lunar computation. It may then at least be assumed that there is nothing to shew that the parties intended to use the word month in a sense different from its ordinary acceptance in legal instruments, which is confined to lunar months ; and if so the delivery of the draft of the conveyance on the 24th of *April* was out of time. The only remaining question is, whether a delivery within the time specified be not a condition precedent. The condition was imposed by the vendors upon themselves for the benefit of the purchaser, and is the same thing in effect as if they had agreed to deliver him a specific thing upon payment of a sum of money, in which case it never could be contended that he would be bound to pay the money before delivery of the thing. Here the precise time for the delivery being fixed, it is not competent to the plaintiff to substitute another time ; but the defendant has a right to insist upon performance in the manner agreed upon. If so, the plaintiff has failed in proving his averment, which for the reasons above alleged, is a material one. As to the argument that the defendant has discharged the plaintiff from the performance by not insisting upon it at the time of the delivery of the draft, it is sufficient to say that if the plaintiff would have availed himself of that discharge, he should have framed an averment to that

effect according to the mode adopted in *Jones v. Barkley* (a). He cannot do it under the present averment.

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LE BLANC J. (b). Several points have been agitated in the discussion of this case, but I do not feel it necessary to go into all of them, because, upon the first, the Court are clearly of opinion in favour of the plaintiff. I allude to the point respecting the time within which the draft of the conveyance was agreed to be delivered to the purchaser. It is very true, as has been stated, that in matters temporal the term month is understood to mean lunar month, whilst in matters ecclesiastical it is deemed calendar, because in each of those matters a different mode of computation respectively prevails: the term, therefore, is taken in that sense which is conformable to the subject-matter to which it is applied. Still in matters of contract the question will ever be, what was the intention of the contracting parties at the time when they made use of the word. Looking at this case, I think the parties clearly had in their contemplation calendar and not lunar months. The date of the sale is the 24th of *January*, and the conditions provide for the delivery of an abstract of the title to the purchaser within a fortnight from that date, which is to be returned by him at the end of two months. The draft is then stipulated to be delivered within three months, which is to be re-delivered to *Colling* within four months, and final payment to be made on the 24th of *June* following. This completes a period of exactly five calendar months from the date of the sale, and shews clearly that the parties had in their contemplation, in the prior limitations of two, three, and

(a) *Doug.* 684.(b) Lord *Ellenborough* C. J. was absent.

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four months, the same respective portions of time as in the ultimate limitation, which is calendar and not lunar months. As to the other point, it is clear that it is a condition-precedent that a draft of the conveyance should be delivered to the purchaser, the question is, whether it must be done by a particular day. It is not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the rule that where a condition does not go to the whole consideration^(a) of the contract, but to a part only, it is not a condition-precedent.

BAYLEY J. I am of the same opinion upon both points. It was not a condition-precedent that the draft should be delivered by a particular day; for I do not consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time. Upon the other point it seems to me, on referring to the particulars of sale, that months were intended as calendar months; and this construction is a beneficial one for the defendant, for by the conditions he is allowed two months for examining the abstract, and one for the draft of the conveyance; therefore, by construing them calendar the time allowed him is enlarged beyond the period of lunar months.

Rule discharged.

(a) See *Havelock v. Geddes*, 10 East, 564.

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PINERO, Gent. *against* HUDSON.Friday,
Feb. 5th.

ABBOTT shewed cause against a rule obtained by *Espinasse* for setting aside the service of a writ of attachment for irregularity. The irregularity alleged was in the English notice, which was to appear at the return of the writ, being the 28th day of *November* 1812, which dates were in figures, and not in words at length, which it was contended the statute of 5 G. 2. c. 27. s. 1. 4. required. He contended that according to the cases of the *Weavers' Company v. Forrest* (a), *Elliott v. Parrott* (b), and *Steel v. Campbell* (c), notices were not held so strict.

The *English* notice to appear at the foot of a writ of attachment must contain the date of the day of appearance in words at length, not figures.

BAYLEY J. (the only Judge in court) was of opinion, that as by the first section of the statute it is required that the proceedings shall be written *in words at length*, the fourth section, which requires that upon every copy of such process there shall be written *in like manner* an English notice, must by reference to the first section be taken also to mean *in words at length*, and therefore made the

Rule absolute.

(a) *Str.* 1232.(b) *Barnes*, 425.(c) 1 *Taunt.* 424.

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Friday,
Feb. 5th.EDWARDS and Another *against* BOBBIT.

A bond given to parish officers reciting that *B.* had taken a house in the parish for a term of 7 years, and conditioned to indemnify the parish against any charges which they might sustain on account of *B.* and his family becoming inhabitants of and belonging to the parish, is not discharged by *B.*'s purchasing an estate of the value of 30*l.* in the parish, and residing on it upwards of 40 days, after the expiration of the 7 year's lease.

DEBT by plaintiffs as survivors of *John Watson*, on bond dated 3d *October* 1794 for 300*l.* The defendant cravedoyer of the bond, which was given by the defendant as surety for one *William Turner* to *Edwards*, *Watson*, and *Cook*, churchwarden and overseers of the poor of the parish of *Dennington* in *Suffolk*. He also cravedoyer of the condition, by which, after reciting that *Turner* had taken a lease of the *Queen's Head* inn belonging to the said parish, for 7 years from the 10th *October* 1794; and that he having a wife and six infant children (naming them), it was agreed between him and the parish officers and principal inhabitants that notwithstanding *any* settlement he and his family might gain by becoming inhabitants of *the parish*, he should with a sufficient surety enter into a bond in a penalty of 300*l.* to the parish officers, in order to indemnify them against any charges which they might sustain on account of his (*Turner*) and his family becoming inhabitants of and belonging to the parish; it was therefore agreed that *Turner* and the defendant or either of them should from time to time and at all times thereafter fully indemnify as well the abovenamed churchwarden and overseers of the said parish of *Dennington* and the collectors for the poor of the said parish, which then were or thereafter should be for the time being, and their successors and every of them, as also all other the inhabitants and parishioners of the same parish and every of them for the time being, of and from all charges which should arise in respect of *Turner* and his wife and their said children, or any child

or children wherewith the said wife then was or there-
 after might be pregnant, and also of and from all actions,
 &c. touching the matters aforesaid or any of them. The
 third plea then stated, that after the expiration of
 the term of 7 years in the condition mentioned, to
 wit, on the 10th of *December* 1807, at &c., he the said
William Turner bonâ fide purchased an estate situate in
 the said parish of *Dennington* for a sum of money ex-
 ceeding 30*l.*, and *bonâ fide* paid the money for the same;
 and that afterwards (to wit), on &c., and for a long
 space of time exceeding the space of 40 days after such
 purchase and payment, *Turner* continually resided in and
 occupied the said estate, to wit, at &c., and that neither
 the churchwardens and overseers, nor the officers, pa-
 rishioners, or inhabitants of the said parish, nor any or
 either of them, at any time after the making of the said
 writing obligatory, and before *Turner* had resided in and
 occupied the said last-mentioned estate for longer than
 the space of 40 days, was or were in any manner
 damnified in respect of *Turner* and his wife or any
 of their children, or touching any of the matters men-
 tioned in the condition of the bond. Demurrer and
 Joinder.

Marryat, in support of the demurrer, denied that the
 purchase of the estate and residence thereon as stated in
 the plea, superseded the settlement which *Turner* had
 previously acquired by becoming an inhabitant of and
 renting the *Queen's Head*, and gave him a new settlement
 in the parish in respect of such estate. But admitting
 that it did, still he contended that it made no difference
 as to the defendant's liability, because, according to the
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express terms of the condition, the defendant was bound to indemnify the parish against the consequences of *Turner* and his family becoming inhabitants of and belonging to the parish: the language of the condition is precise, it is, "notwithstanding *any* settlement *Turner* and his family might gain by becoming inhabitants of the parish," and not merely by his becoming the occupier of the particular house. But if the defendant's plea be sustainable, then if *Turner* had removed at the expiration of the first quarter of a year to another house in the parish, and resided in it long enough to gain a settlement, the bond would have been suspended. As to the period to which the condition is made to extend, the condition relates as well to children then born as to *any child or children which the wife thereafter might be pregnant with*, so that it is clear the intention of the parties was to extend the indemnity to events which might happen after the expiration of the seven years. Here the Court interrupted *Marryat*, and called upon the other side.

Abbott, contra, contended that the indemnity was limited to the period of the seven years for which the lease was granted. The condition of the bond recites the taking the lease to be the occasion of the defendant's entering into the security, and every thing must be construed with reference to that occasion, and not be extended beyond it. If therefore the parish was damnified by consequences which did not arise out of the inhabitancy under that lease, but out of an inhabitancy unconnected with it, or which happened after the lease expired, in either case the defendant would not be liable.

Lord

LORD ELLENBOROUGH C. J. The condition applies in terminis to *Turner's* becoming an inhabitant of and belonging to the parish, and the consequences which might result from it. One of the consequences was his acquiring a settlement by renting and occupying the *Queen's Head*, and thereby in case of poverty becoming chargeable to the parish. This was what the parish officers intended to secure the parish against at the time when they let the house to *Turner*, and this consequence has happened notwithstanding what the plea alleges of his having subsequently purchased and resided on an estate in the parish, which might have conferred a settlement upon him there if he had not gained one before, but having a continuing settlement there already, he could not gain a second settlement. There is no such thing as a cumulative settlement known in the law.

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BAYLEY J. The parish was damnified after the seven years by a settlement acquired during the seven years.

Judgment for the Plaintiffs.

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DOE on the several demises of WILLIAM and THOMAS JAMES, otherwise MORGAN, against HALLETT.

Devise to the use of *A.*, only surviving son of *J. S.*, for life, and to his first and other sons, &c., and for default of such issue to the use of the first, second, and of all and every other son and sons of *J. S.* lawfully to be begotten, and the heirs male of the body of such first and other sons, with proviso that the said *A.* and his first and other sons, and also the first and other sons hereafter to be born of the said *J. S.* should reside at the family house, &c.: Held that the second son of *J. S.*, born before the date of the will should take upon the death of *A.* without issue.

IN ejectment brought to recover possession of several messuages and lands in the parishes of *Kintbury* and *Hungerford*, in the county of *Berks*, tried before *Wood B.* at the last *Lent* assizes for that county, the plaintiff recovered a verdict subject to the opinion of this Court on the following case.

John James being seized in fee of the premises in question by his will duly made and published, dated the 8th day of *December* 1768, devised all his manors, messuages, lands, tenements, and hereditaments, and real estates in the counties of *Berks* and *Wilts*, unto Sir *John Filmer*, Sir *Thomas Head*, and *William Blackstone*, Esquire, and their heirs, to the use of his wife *Alice James* for and during the term of her natural life, and from and immediately after her decease, then he devised as follows, “to and for the use and benefit of *William Head*, only surviving son of the said Sir *Thomas Head*, until such time as he shall attain his age of 24 years, (with power to the trustees to let the premises, receive the rents, and lay out the surplus for his benefit, over and above what should be deemed sufficient for his maintenance;) and after he shall so attain his age of 24 years, then to the use of him the said *William Head*, for and during the term of his natural life, and after the determination of that estate, to the use of the said Sir *John Filmer*, Sir *Thomas Head*, and *William Blackstone*, and their heirs, for and during the life of the said *William Head*,

Head,

Head, in trust, to preserve the contingent remainders hereinafter limited from being defeated, and immediately after the decease of the said *William Head*, to the use of the first, second, third and of all and every the other son and sons of the body of the said *William Head*, lawfully to be begotten, one after the other, according to their priority of birth, and the heirs male of the body of such first and other sons respectively issuing, and for default of such issue, to the use of *the first, second, and of all and every other son and sons of the said Sir Thomas Head*, lawfully to be begotten, according to priority of birth, and the heirs male of the body of such first and other sons respectively issuing, and for default of such issue, to the use of him the said *Sir Thomas Head*, for and during the term of his natural life. Then followed similar limitations to the use of *James Morgan, John Head, Richard Head, James Head, and Charles Head*, respectively for life, remainder to the use of the trustees to preserve contingent remainders, remainder to the use of the first and second and all and every other son and sons of the said *James Morgan, John, Richard, James and Charles Head* respectively, lawfully to be begotten in the same terms as limited to the sons of *William Head*, and in default of such issue to the use of his (the testator's) own right heirs. The will then proceeded thus: "Provided always and for preserving the memory of my family, and continuing my said freehold estates in the name of my said family, I do hereby declare my will and intention to be that all and every the person and persons who from and immediately after the decease of my said wife shall, by virtue of the limitations hereinbefore contained, be entitled to the immediate estate of freehold in my said manors, lands, tenements, and here-

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ditaments, shall take and use the surname of *James* only, and take and bear the coat armour of my family only, and the better to enable him and them so to do, that he and they shall and do within 14 months after he and they shall become so entitled, petition for and endeavour to procure an act of parliament for that purpose, and if such person who shall be so entitled as aforesaid, shall not petition for and endeavour to procure such an act as aforesaid, then my will is that such person so refusing or neglecting the same shall take no benefit by this my will, but that in such case my said manors, lands, tenements, and hereditaments shall go over to the person who by virtue of the limitations hereinbefore contained shall be entitled to the next immediate remainder in the said premises, and who shall take and use the name and arms of *James* only, and shall and will within 14 months from the time he or they shall become so entitled, petition for and endeavour to procure such an act as aforesaid, as if such person or persons who shall refuse or neglect to petition for and endeavour to procure such act as aforesaid were naturally dead. Provided also, that the said *William Head* and his first and other sons, and also the first and other sons *hereafter to be born* of the said *Sir Thomas Head*, and the heirs male of their respective bodies, shall from and immediately after they shall respectively become entitled to my said manors, lands, tenements, and hereditaments, reside and live at my house at *Denford* aforesaid, and in case he or they shall not reside and live at my said house, then my will is that my said manors, lands, tenements, and hereditaments shall go over to the next person in remainder by virtue of the limitations aforesaid, who will and shall reside and live at my house at *Denford*."

The testator *John James* died in the month of *January* 1769, leaving his widow *Alice*, the said *Sir Thomas Head*, the said *William Head*, *Walter James Head* another son of *Sir Thomas Head*, and the said *James Morgan*, him surviving.

William Morgan, the father of the said *James*, died about the latter end of the year 1762.

Sir Thomas Head had had two other sons, both of whom died some time before the date of the will, and at the date of the will *William Head* was the eldest surviving son of *Sir Thomas Head*, and *Sir Thomas Head* had no son born after the date of the will.

Upon the death of the testator his widow *Alice* entered upon and enjoyed the estates for her life, and upon her death, which happened in *July* 1769, the trustees under the will entered and took the rents and profits according to the directions of the will, for the use of and until the death of *William Head*, the son of *Sir Thomas Head*.

William Head took the surname of *James* in addition to his own names, and died a bachelor under the age of 24 years in *February* 1777; and upon his death *Walter James Head* entered into possession of the estates, and took the surname of *James*: he is still living, and he and the persons claiming under him have ever since been in possession.

Walter James Head was born in the month of *February* 1759, and was personally known to the testator before the date of the will.

Sir Thomas Head died in *October* 1779. The said *James Morgan* died on the 15th of *September* 1810, leaving *William James* otherwise *William Morgan*, one of the lessors of the plaintiff, his eldest son, and *Thomas James*

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James otherwise *Morgan*, the other lessor of the plaintiff, his second son.

The lessor of the plaintiff, *William James* otherwise *Morgan*, was in *America* at the time of his father's death, and had been resident there for some years: he came to *England* on the 28th day of *February* in the year 1811, and he and the other lessor of the plaintiff within 14 months after the death of their father, assumed and have borne the name and arms of *James*; but without obtaining the king's licence for either of those privileges.

On the 13th of *January* 1812, the lessor of the plaintiff *William James* otherwise *Morgan* presented a petition to the House of Lords, for leave to bring in a bill to authorize him to take and bear the name and arms of *James*, in compliance with the proviso contained in the said will, and did obtain leave to bring in such bill; and such bill was brought into the house on the 22d day of the said month of *January*, and was depending in parliament at the time of the trial of this action.

The case then found that the defendant *Hallett* was in possession, &c. The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If he is, the verdict is to stand: if not, judgment of nonsuit is to be given: but at the trial, liberty was reserved to either party to turn this case into a special verdict.

Preston for the lessors of the plaintiff, contended, that under the limitation "to the first, second, and all and every other the son and sons of Sir *T. Head* lawfully to be begotten," *Walter James Head*, the second son of Sir *T. H.* at the date of the will, was not entitled to an estate tail or any other estate. He first adverted to the plan of the will,

will, the main object of which he said was to provide for *William Head*, then a minor, and his male issue, and provision is accordingly made for him during his minority, and for his sons to be begotten, but it does not appear that the testator contemplated any other existing son of Sir *T. H.* at that time. Indeed he has expressly described *William* as the only surviving son, which was certainly not the fact, and the subsequent remainder is confined to the sons of Sir *T. H.* "*to be begotten*," i. e. which were not then in being. There is therefore an entire omission in the will of any express mention of *Walter James*, and he is not impliedly comprehended within the subsequent limitation, unless it can be shewn that the words *to be begotten* were intended to be used in the same sense as *begotten*, and farther that the words "*hereafter to be born*," which are the words used in the proviso, include a son *born before*. It is laid down indeed in *Co. Lit.* 20. b. that *procreandis* shall extend to the issue born before, for which the 10 *Edw.* 3. 20. is cited in Lord *Hale's* MS. note upon this passage, who adds however, "but it is held that where the words were *in posterum procreandis*, sons born before shall be excluded on account of the peculiar force of *in posterum*." That was so decided in 3 *Leon.* 87. Anon., and in *Lomax v. Holmden* (a) Lord *Hardwicke* adopted that case, for he there said that if the words had been *to be begotten*, they would clearly have described an *after-born* son. There is no authority in which it has been held that in a case where the party is to take by purchase, the words *to be begotten* may be construed the same as *begotten*. *Co. Lit.* and the authorities founded upon it apply only to a case of de-

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(a) 1 *Pez.* 290.

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scnt. Here it is probable that the omission arose from the circumstance of this will having been copied from a former will made before the birth of *Walter James*, but it matters not whether it was by mistake or design; if it be such an omission as the Court is not at liberty to supply, the lessors of the plaintiff are entitled to take advantage of it. There is no case which has gone the length of supplying such an omission. *Chapman v. Brown* (a) was the case of a clear omission, yet the Court refused to supply it, but construed the devise into an estate tail in order to effectuate the general intent, but there Lord *Mansfield* expressly took the distinction, saying that a Court of justice might construe so as to imply an intent not particularly specified, but could not from arbitrary conjecture, though founded on the highest degree of probability, add to a will or supply an omission. So in *Clements v. Paske*, Hil. 1784, MS. note of Mr. *Trower*, which was a case sent from the Court of Chancery to this Court. Devise to *A.* for life, and after his decease to the first and eldest son of the body of his (the testator's) nephew lawfully issuing or issued, and for default of such issue then likewise to the second, third, and every other son of his nephew successively and in remainder one after another as they should be in seniority of age, and the several and respective heirs male of the body of every such second, third and every other son or sons, the eldest of such sons and the heirs male of his body being always preferred before the younger. It was decided that the nephew took an estate tail by implication, in order to effectuate the general intent, and let in the descendants of the first son. But in this case there is

(a) 3 Burr. 1626.

not any general intent to be collected from the context in favour of *Walter James*; on the contrary, the words *to be begotten* are frequently used for the very purpose of marking the distinction between sons born and to be born; and even if there were any such general intent apparent, it would be impossible to raise an estate tail by implication in Sir *T. H.* (the father,) because a life estate is expressly limited to him in default of his issue. It may be said perhaps, that *Walter James* might have become the first son by the death of his brother *William* in the lifetime of the testator, and in that event have answered the description; but in *Wilkinson v. Adam*, MS. case from Chancery, the rule laid down was, that the date of the will and not the death of the testator is the time from which the will speaks.

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Holroyd contra. The limitation to the first and other sons of Sir *T. H.* to be begotten includes *Walter James*, who was the second son in esse at the date of the will. It is a settled rule in the construction not only of wills but also of deeds, matters of record or fine, or matters of pleading, that the words *begotten* and *to be begotten* are words of the same import, unless it appear to be the intention of the parties using them to use them in a sense as contradistinguished from each other. But that intention does not appear on the face of this will, neither do the words in the proviso, according to the cases, carry it farther. The case in 3 *Leon.* 87. from which alone any argument can be drawn in favour of the lessors of the plaintiff, is very distinguishable, because there were other circumstances in that case besides the use of the words *in posterum*, to shew that those words were meant to be restrained to after-born sons, and supposing that case to be

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law it is at most but the dictum of a single judge. As to Lord *Hale's* MS. note, the only part of it which is his, is the reference to the 10 *Edw. 3. Pasch. 20.*, in which case as well as in 24 *Edw. 3. Trin. 15.* it was held upon a question of variance between the writ and fine that *procreatis* and *procreaverit* extended to children *to be begotten*. These words were considered merely as expressing from whom the persons to take were to issue, and not at what time they were to issue. It is said that there is no express mention of *Walter James*, but it is admitted that the omission is owing to a slip of the testator, and even as the will now stands in one event which has been already anticipated in argument, he would have been expressly comprehended, viz. by the death of *William* during the testator's life. It was so decided in *Lomax v. Holmden*, where the second son took the estate under the description of first son of the body, and it was there also decided that *begotten* and *to be begotten* mean the same. But it is said that those words have been held the same in the case of descent only, but not in that of purchase; but *Cook v. Cook* (a) was a case of purchase: and in *Hewet v. Ireland* (b), which was also a case where the party took by purchase under a deed and fine, the Lord Chancellor held that the words which *shall be begotten* meant *begotten*, for that the settlor could never intend to neglect a daughter who was too young (being ten years old) to have offended him. Here *Walter James* was about nine years of age at the date of the will, so that that observation strongly applies. Then as to the words in the proviso, "*hereafter to be born*," the case of *Hebblethwaite v. Cartwright* (c) has decided that the word *hereafter* does not necessarily con-

(a) 2 *Vern.* 545.(b) 1 *P. Wms.* 426.(c) *Cas. temp. Talb.* 31.

fine the sense to *after born*, it carries it no farther than to *be begotten*. Here the words *to be begotten* occur in five or six several limitations of this will, and if their sense is to be restrained in one limitation, it must be so in the rest, to which such a construction cannot be reasonably supposed to apply. The words of this will must be construed according to the rules laid down by Lord *Alvanley* C. J. (a). 1st, That words are always to be taken in their ordinary sense, unless the testator has manifested an intention to put a different sense on them; and, 2dly, that it must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controlled by such apparent intent. Here there is no plain intention manifested to use the words *to be begotten* in a different sense from what the law will otherwise put upon them. He then stated that there had been a decision in the Court of Chancery in 1778 by Lord *Bathurst* C. upon this very will, upon a bill of revivor filed after the death of William Head, &c., on which it was decreed that *Walter James*, (the then plaintiff,) by the death of *William* had become the first son of Sir *T. H.*, and was entitled under the limitations of the will. He also objected to the title of *William James*, (one of the lessors of the plaintiff,) that his absence in *America* did not excuse him from petitioning for an act of parliament within 14 months from his father's death.

Preston in reply. The last objection cannot avail, because there are two demises, one from the eldest, the other from the second son, who is clearly within time. The decree stated to have been formerly pronounced in this

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(a) 3 Bos. & Pull. 627. *Poole v. Poole*.

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case was upon consideration of the former will, and other grounds, which the Court cannot now notice. As to *Hebblethwaite v. Cartwright*, it is applicable only to a case of descent, and *Cook v. Cook* and *Hewet v. Ireland*, which it must be admitted were cases of purchase, are founded on a misapplication of the doctrine in *Co. Lit.* to cases not within the meaning of it. In the first of those cases the circumstances are not fully stated in the report; and the last, if it should arise again, would be worth re-considering. In *Counden v. Clerk (a)* the rule is laid down, that a person who is to take as purchaser must answer every part of the description under which he takes.

LORD ELLENBOROUGH C. J. It would be a matter of the deepest regret if in consequence of the joint effect produced by the blunder of the testator and the neglect of his attorney, we were compelled to put a construction on this will which would defeat the testator's intention, and exclude those whom he meant to make the objects of his bounty. I call it a blunder of the testator, because if he had read over his will with attention before he executed it, he must have perceived that he had misdescribed *William Head* as the only surviving son of *Sir Thomas* at the time when another son *Walter James*, then nine years old, was in being, and as is stated was then personally known to him. It was also a neglect on the part of his attorney in not making inquiries, after such a lapse of time as intervened between the first and second will, whether the state of his family had undergone any alteration. But I disclaim all considerations of this sort in the present instance, and am willing that the conjoint omis-

(a) *Heb. 29.*

sions of the testator and his attorney should have their full legal effect. The will must stand or fall according to the language of it, but I think that language will not upon a fair construction of it, disappoint the intention of the testator. The first mistake is in the description of *William Head* as the only surviving son. Now he was not the only son, for there was another living of the age of nine years. But how does that mistake affect or control the subsequent limitation? The limitation is to the use of the first, second, and all and every other son and sons, &c., i. e. who at the death of *W. Head* would become first son. Therefore *Walter James* is certainly within the comprehension of the words; there is only a misdescription of the first taker. Then come the words, "lawfully to be begotten," which would give rise to a material question if it had not been settled by a series of authorities, and impeached by none, that "to be begotten" mean the same as "begotten," embracing all those whom the parent shall have begotten during his life, quos procreaverit. It was so considered in *Hervey v. Ireland*, and it was there said that as procreatis takes in children to be begotten, and procreandis includes children then begotten, so the words "which shall be begotten," upon which the question turned in that case, should relate to the death of the parent, and then the daughter born before the settlement should be included under that description. The same sense is put upon the words in *Co. Lit.* 20. So in *Cook v. Cook*, upon a devise to the issue of *J. S.*, who had a daughter, and afterwards a son, it was held that both should take, and the Lord Keeper said that the words begotten and to be begotten are the same, as well upon the construction of wills as settlements, and take in all the issue after begotten. But it may be said that

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neither in *Hewat v. Ireland* nor in *Cook v. Cook* are the words “in posterum” to be found, the peculiar force of which was supposed in 3 *Leon.* 87. to control the other words. But what was the case in 3 *Leon.*? There the feoffor made a feoffment to the use of his younger son in tail, and after to the use of the heirs of his body in posterum procreandis. The case therefore did not turn entirely upon the effect of the words “in posterum,” for the feoffor’s passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude that son altogether. I therefore think that what was said by *Wray J.* in that case was right. But in *Hebblethwaite v. Cartwright*, where the words were, to the heirs male of the body hereafter to be begotten, which are the same as in posterum procreandis in 3 *Leon.*, yet Lord *Talbot* held that those words did not confine the limitation to the issue born after, but took in that born before. That decision indeed does not affect to overrule the case from *Leon.*, nor does it appear by the report that that case was cited in argument, and brought under the view of the Court; still it is to be considered as an express decision of that very eminent Judge upon the construction of these words. The case therefore of *Hebblethwaite v. Cartwright* disposes of the words in posterum. Here the words “hereafter to be born” occur only in the proviso, and I cannot say that “to be born” are to be taken in a different sense from “to be begotten” in the former parts of the will, but the same construction will apply to all, and “hereafter” has been shewn not to restrain their general sense. On the authority, therefore, of all the cases, I think the words “to be begotten” will include then born as well as to be born, and that *Walter James* is comprehended within the terms of this will as having become

become the first son of Sir *Thomas* upon the death of *William* without issue.

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LE BLANC J. The Court cannot proceed in forming their judgment on this case upon any reference to the mistake which has been stated as the cause of this omission in the will, nor can they rely on the decree of Lord *Bathurst* when the former will is stated to have been made a subject of consideration. The question must be decided simply on the construction of this will. The testator sets out with stating a fact, which is not true as found by the case, viz. that *William Head* was the only surviving son, for there was then another son, *Walter James*, and the testator knew that circumstance. Then he gives to *William* an estate for life, and after his decease to his first and other sons in tail, and then come the words on which the doubt arises, with remainder “to the use of the first, second, and all and every other son of the said Sir T. Head lawfully to be begotten. It is said that *Walter James*, who was the second son in existence at the time when the will was made, cannot take because he does not come under this description. But let us see how the case would have stood if the testator had not used the words “to be begotten,” but only “lawfully begotten.” In that case *Walter James* would not have answered the description of first son, because the testator had before given the estate to *William* as the eldest, but would he not have taken at the death of *William* as being the first son then begotten? Then looking to the words “to be begotten,” what difference do they make? The cases have already established that those words will embrace children both then born and to be born, and in the MS. case from *Chanc.* cited by Mr. *Preston*, it was held that there was no distinction

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tion between born and to be born, and that too, in a case of purchase and not of descent (a). No doubt circumstances might have existed to shew that the testator meant to exclude begotten children by this description, but there are no such circumstances that I can find. The testator limits the remainder to *William* the eldest son, and afterwards to the first and other sons of Sir *Thomas* to be begotten; and if those words comprehend begotten, they will let in a second son then in esse, for there does not appear any intention to exclude, but only to give the estate to *William* the first son in the first instance, and afterwards, if he died without issue, to the son next in succession. But it is said the words “hereafter to be born,” which occur in the last of the two provisos, indicate an intention to exclude, but as both the provisos are meant to refer to the same persons, I think the words in the last must be taken not as words of exclusion but merely of description, meaning those persons who according to the words of the former proviso would, by virtue of the limitations of the will, be entitled after the death of the wife to the next immediate estate. There is therefore nothing to manifest an intention on the part of the testator to exclude *Walter James*, and there is no rule of law which imposes upon the words that the testator has used such a construction as will necessarily exclude him.

BAYLEY J. I am of the same opinion. This is purely a question of construction upon the will. We are bound to say, that when this will was made the testator was not aware of any other son than *William*, because he expresses that he is the only son; and where a testator uses the

(a) *Wilkinson v. Adam*.

words to be begotten, not being aware of any other issue, the rule is that those words shall include children then born; and if it were not so, it would militate in every case against the intention of a testator. The limitation is made to the children in respect of the stock, and not of personal affection to them; but if the words to be begotten were held to exclude children then born, it would exclude a child born a few days before at a distant place. That affords a good reason therefore for considering the words "to be begotten" as of the same import as begotten, because otherwise great injustice might arise; and as the word "begotten" does not exclude children after born, so neither do "to be begotten" exclude children then born, being merely words to denote the children of the stock. But if there are circumstances to shew a plain intention to use the words in a more restricted sense, they will bear a construction in conformity with such intention; but it is admitted that there is nothing here to shew such an intention. It is said that *Walter James* does not come within the description of first son of *Sir Thomas Head*, because *William* was the first son; but first son may mean first son after *William*, at the time of his death without issue, when the remainder was to take effect. I cannot place reliance on the words in the proviso "hereafter to be born," because when I find that the testator was so uncertain of the fact as to state that one was the only son, who was not the only son, so I cannot say that in using the words "hereafter to be born," the testator, who was *inops consilii*, meant to denote thereby a clear intention to confine his bounty to the exclusion of a son then born.

Judgment of nonsuit.

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Friday,
Feb. 5th.MARTINI *against* COLES and Others.

A factor cannot pledge the goods of his principal: therefore, where goods were consigned from abroad to a factor to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor or his assigns, and the factor afterwards indorsed and delivered the bill of lading, together with the goods, to the defendants, as brokers, with instructions to do the needful, and the defendants made advances to him on the credit of those and other goods, without knowing that he was not the owner of them: Held that the defendants could not retain the goods against the consignor until payment of the debt due to them from the factor on account of these advances.

TROVER for coffee. At the trial before Lord *Ellenborough* C. J. at the *London* sittings, a special verdict was found, which stated in substance as follows:

The plaintiff, on the 29th of *March* 1810, shipped on board a vessel then lying in the river of *Demerara*, and bound for *London*, a quantity of coffee, his property, and consigned the same to one *Vos*, then a merchant in *London*, his correspondent and factor, to be sold by *Vos* as such factor, for the benefit and on the account of the plaintiff, and took bills of lading from the master of the vessel for the said goods. By the terms of the bills of lading (which were in the usual form) the coffee was to be delivered in the port of *London* to *Vos* or his assigns, he or they paying freight. The plaintiff transmitted one of the bills of lading from *Demerara* inclosed in a letter from him to *Vos* in *London*, dated 30th of *March* 1810, directing *Vos*, after sale of the goods, to place the proceeds to the credit of his private account with *Vos*, which bill of lading and letter were duly received by *Vos*. The ship arrived in the port of *London* in *June* following, when the goods were delivered to *Vos* for the aforesaid purposes, who, at the time when he received the bill of lading and goods, was and still is indebted to the plaintiff to a considerable amount. On the 16th of *June* *Vos* indorsed the bill of lading to the order of *W. and F. Coles* and *Williams* (the defendants), and afterwards delivered the same, together with other bills of lading and the said goods, to the defendants (who are sworn brokers in the city of *London*), sending with the bills of lading a letter as follows:

Messrs.

IN THE FIFTY-THIRD YEAR OF GEORGE III.

Messrs. *W. and F. Coles.*

June 16th, 1810.

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My last respects are of the 13th instant, when I handed you 2 bills of lading, and advised my draft for £250; I have now 4 bills of lading, viz. (here followed a description of the 4 bills of lading, one of which related to the coffee in question) wherewith you will receive do the needful for my account. (Signed) *H. Vos.*

Vos at the time of such indorsement of the bill of lading and delivery of the goods was indebted to the defendants in about 300*l.*, and the defendants afterwards, on the faith of these and other goods put into their hands by *Vos*, advanced to him from time to time various sums of money, in consequence of which, at the time of his bankruptcy he was and still is indebted to the defendants in a sum greatly exceeding the value of the coffee. The defendants, at the time when they received the bill of lading and goods from *Vos*, and advanced money to him thereon, had no knowledge that he was not the owner of the coffee. *Vos* was a general merchant as well as factor, and as such usually employed the defendants as general brokers in the sale of *West India* produce. *Vos*, soon after the indorsement of the bill of lading, became a bankrupt, the said goods then remaining unsold in the hands of the defendants, whereupon the plaintiff gave notice to the defendants of his claim to the goods as owner, and demanded of them the delivery of the goods; but the defendants refused to deliver them without payment of the debt due to them from *Vos*, and before the commencement of this action converted the goods to their own use.

Richardson for the plaintiff stated the only question to be whether a factor has authority to pledge the goods of his

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his principal, the pawnee at the time having no knowledge that the factor was not the owner of the goods. He contended that the law had been established for upwards of half a century that he had no such authority. In *Paterfon v. Tash* (a) it was so laid down by *Lee C. J.* not as a new principle, but as a well-known rule of law at that time, and although that was only a *nisi prius* decision, it derives authority from all the subsequent decisions on the point. In *Wright v. Campbell* (b) the general rule was admitted, and the only doubt there was whether it was a case of *bonâ fide* sale, or only of collusion between the factor and indorsee of the bill of lading, upon which a new trial was granted; but *Lord Mansfield C. J.* said that until an actual sale of the goods the principal retains his lien. In *Daubigny v. Duval* (c) the rule was recognized and acted upon, and that case is the more remarkable, because there an exception was attempted to be engrafted on the general rule, viz. that the pawnee might acquire a lien to the extent of what he advanced, provided such advance did not exceed the amount of what the principal owed to his factor: and *Lord Kenyon C. J.* then expressed considerable doubts upon the question, but he afterwards seems to have changed his opinion, as appears by several cases referred to by *Lord Ellenborough C. J.* in *M'Combie v. Davis* (d). The same rule is expressly stated as received law by *Lord Loughborough C. J.* in *Lickbarrow v. Mason* (e), and afterwards when *Lord Chancellor*, in *De Bouchout v. Goldsmid* (f), and was acted upon by this Court both in *M'Combie v. Davies* (g), and *Newson v. Thornton* (h), in the latter of which it was

(a) *Str.* 1178.(b) 4 *Burr.* 2046.(c) 5 *T. R.* 604.(d) 7 *East*, 7.(e) 1 *H. Bl.* 362.(f) 5 *Ves.* 211.(g) 6 *East*, 5387 *East*, 5.(h) 6 *East*, 17.

held that as the property could not be pledged, so neither could the bill of lading, which was the symbol of the property. Here, as was said by *Lawrence J.* in that case, the defendants might have ascertained the property by enquiring for the letters which accompanied the bill of lading. The case of *Pickering v. Busk* (a) was a case of sale, and the judgment of the Court proceeded on the ground of the plaintiff having by his own act given authority to his broker to sell the goods, and therefore does not apply in principle to the present; and although Lord *Ellenborough C. J.*, alluding in that case to *Paterfon v. Tash*, said that it was a hard case, he by no means professes to over-rule it, nor was it necessary for the purposes of that decision.

Walton contra. The case states that *Vos* was a general merchant as well as factor, and as such usually employed the defendants, and there is this distinction between this case and *Newson v. Thornton*, that there the bill of lading was to the order of the shippers, whereas here it was to *Vos* himself, who might therefore on that account, coupled with their knowledge of his dealings as a merchant, reasonably be mistaken by the defendants for the owner of the goods; for as to the argument that they might have ascertained the fact by enquiring for the letters, it is sufficient to say that the practice is unusual, and would not be tolerated in commercial dealings. It is obvious, on the other hand, that the plaintiff might have prevented all mistake by specially indorsing the bill of lading to *Vos* as factor. If the principle of *Paterfon v. Tash* be not new, neither is that upon which the case

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(a) 15 East, 38.

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of *Evans v. Marlett* (a) was decided, viz. that a consignment of goods by bill of lading to *A.*, transfers to *A.* the legal property, although it may be subject to trusts, and enables him to sue for them in his own name; and a distinction was there taken between goods consigned to *A.* generally, and goods consigned to *A.* for the use of *B.*, in which latter case it was said that *B.* must sue. In *Lickbarrow v. Mason* (b) *Buller J.*, contrary indeed to the opinion of some of the other judges, held that the indorsement of the bill of lading transferred the legal property, and he cited *Fearon v. Bowers* in 1753 as in point, and what Lord *Mansfield* had said in *Wright v. Campbell*; and such was the ultimate decision of *Lickbarrow v. Mason* upon the venire de novo directed by the House of Lords. [*Bayley J.* That was the case of a transfer of the bill of lading by the vendee.] Here as in *Wright v. Campbell* the goods were put into the hands of the brokers to sell, in discharge of prior debts; it is not therefore the case of a mere pledge like *Newson v. Thornton*. Then as a factor who has authority to sell the goods, has a lien for his advances upon them, and may retain for such advances; in like manner he may authorize another, to whom as broker he commits the goods for the purposes of sale, and who makes advances upon them, to retain also. It is for the interest of the consignor that the broker should have this authority, as it will facilitate the raising money to answer the bills of the consignor; otherwise the goods must frequently be sold to a disadvantage, instead of waiting for the best market. In *Pulteney Bart. v. Keymer* (c), it was held that the broker might retain for advances made on the credit of goods

(a) 1 *Ld. Raym.* 271. 12 *Mod.* 156.

(b) *D. P.* 1793. 6 *East*, 24. n.

(c) 3 *Esp. N. P. C.* 182.

lodged in his hands by the consignees, against the owner of the goods. [Lord *Ellenborough* C. J. There the broker had a lien for the duties ; here it does not appear that the defendants had any lien ; Lord *Eldon* held that the broker was not bound to take the indemnity of another in lieu of his lien.] In *Haille v. Smith* (a), a bill of lading was indorsed as a security for future advances, and *Eyre* C. J., who did not agree with *Buller* J. in *Lickbarrow v. Mason*, yet held that the indorsement of the bill of lading operated as evidence of the change of property, and said that in ninety-nine times in an hundred it would be conclusive.

Richardson in reply. If the pawnee chooses to abstain from making enquiries either from motives of interest, or from the practice of his trade ; he must take the consequence. It is said that the bill of lading might have been indorsed specially ; the same argument was urged in *Wright v. Campbell*, but it has never been held necessary ; and surely the symbol of the property can never tend to mislead more than the possession of the property itself. *Evans v. Marlett* only decided that where goods were consigned by bill of lading, such a property was in the consignee as would maintain trover ; but it may be admitted that a factor or consignee in a variety of cases may sue in respect of property consigned to him ; such as, in defence of the property if invaded, or for the price of it, if sold by him ; and perhaps he may be considered as the proprietor against all the world except his principal. As to this being not an ordinary pledge of goods, but a deposit for the purposes of sale, if the broker had

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(a) 1 *Bos. & Pull.* 563.

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not gone beyond that object, the plaintiff would have had no cause of complaint; and that was the case of *Pulteney v. Keymer*.

LORD ELLENBOROUGH C. J. I think that the plaintiff is entitled to recover. The short sum of the argument is this, that by the terms of the bill of lading (which create the only difficulty in the case), the goods were consigned to *Vos*, and for any thing that appears to the contrary to the use of *Vos*; and therefore it might be a question whether *Vos* was not originally interested in them; but it is so usual to do this in cases where the party is only factor, that I cannot rely on this argument. It is the case then of a consignment to *Vos* by bill of lading, without specifying that the consignment was made to him in respect of any particular character he bore. It is indeed much to be regretted that a bill of lading, instead of being launched into the world as an instrument of equivocal import, should not have designated upon the face of it in what character the consignment is to be made, where it is intended that the consignee should fill that of factor only. If that had been done in this case, it would have obviated all doubt: however, when we get at the substance of the transaction as it now stands, it amounts to this, that the parties stood only in the relation of principal and factor. But it has been decided ever since the case of *Paterfon v. Tash*, that a factor cannot pledge. Perhaps it would have been as well if it had been originally decided that where it was equivocal whether a person was authorized to act as principal or factor, a *pledge* made by such a person free from any circumstances of fraud was valid. But it is idle now to speculate upon this subject,

since

since a long series of cases has decided that a factor cannot pledge. But it is said that *Evans v. Marlett* shews that the consignee of goods may maintain an action for them. What then? So may many persons who have but a special property; as a carrier, who is the mere instrument of conveyance, and to whom the goods are only sent for a special purpose; so a warehouse-keeper, who has them for safe custody only, and many others who do not pretend to any absolute property. The decision therefore in *Evans v. Marlett* does not conclude any thing adverse to the proposition in *Paterfon v. Tush*. Where indeed a factor by the assent of his principal exhibits himself to the world as owner, and by that means obtains credit as owner, the principal will be liable who furnished the means; that was so decided before me at *Guildhall*, and this Court afterwards refused a new trial (a). But how does this case stand; *Vos* was the debtor of the plaintiff; therefore he could have no claim on the goods. He receives the goods as factor, and afterwards puts them into the hands of the defendants as brokers, with instructions to do the needful. The defendants therefore received the goods in order to sell them; which makes the only distinction between this and the former cases, viz. that here the possession of the defendants was legal in the first instance. The defendants then having authority to sell the goods, if they had advanced money for any purposes connected with the sale, and for which brokers in the ordinary course of disposing of goods are accustomed to advance it, would have had a lien in respect of such advance; but no claim of that sort is preferred by them; but in this

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(a) *De Leira v. Edwards*.

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state of things the possession is demanded of them, and they do not set up any such lien, but refuse to deliver the goods without payment of the debt due to them for the whole amount of their advances made to *Vos* not only on the faith of these goods in particular, but also of other goods. That is an unfounded claim, according to the case of *Paterfon v. Tash*, and the other cases. Under these circumstances I think that the plaintiff is entitled to recover. The case might have been different, if the plaintiff ultra the bill of lading had given colour of title to *Vos*, so as to have induced the defendants to believe that *Vos* was the proprietor of the goods.

LE BLANC J. Whether it might not originally have better answered the purposes of commerce to have considered a person, in the situation of *Vos*, having the apparent symbol of property, as the true owner in respect of that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate, since it has been established by a series of decisions that a factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being factor. Here *Vos* was clearly factor for the plaintiff; and the circumstance of the goods having been made deliverable by the bill of lading to *Vos* or his assigns cannot make any difference; since it conveyed to him no farther authority over the goods than the party, who consigned them, intended to clothe him with. That authority was to sell, and in that situation *Vos* put the goods into the hands of the defendants, as brokers, to sell, and so far he had authority, and if the defendants had acted up to their character of brokers, and sold the goods, they would have run

no risk. But when brokers exceed their authority as brokers, and become pawn-brokers, by advancing money on the goods before sale, then they subject themselves to all risks. The goods were legally in the hands of the defendants, under the authority of *Vos*; but when they advanced money upon them to *Vos*, they exceeded the authority which he had, for thereby *Vos* became a pawner of the goods instead of a seller; and consequently the defendants, who cannot have a better title than *Vos*, have no right to retain the goods in respect of these advances; and they do not claim for any other advances made by them in their character of brokers, in order to enable them to sell the goods. It has been said, that it would be for the benefit of the consignors abroad that their factors should have authority to pledge the goods of their principals, because their consignments are frequently accompanied with a bill drawn on the factor for a part of the price of such consignments. If indeed advances were made merely to take up the bill of the consignor, and were appropriated to that purpose, there would be no mischief; and that might be considered in furtherance of the authority given by the principal; but if a party make advances to a factor without enquiring for what purpose they are made, he must be contented to rest on the authority with which it shall appear that the factor is clothed. I cannot see any distinction between this case and the series of cases from *Paterfon v. Tash*, down to *Newson v. Thornton*, in which it has been uniformly held that a broker cannot retain for money advanced to a factor, when the factor has become insolvent. The case of *Pickering v. Busk* was considered as a transaction of sale, and not as a pledge; otherwise

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the Court could not have decided it in favour of the defendant.

BAYLEY J. I am of the same opinion. A factor has authority to sell, but not to pledge; and therefore a person who takes a pawn of a factor takes it at his peril. If the principal does any thing to induce the person to believe the factor really the principal, that would be a different case. Cases may perhaps exist, where a principal would be bound by a pledge made by his factor; but supposing one of those cases to be where money has been advanced in payment of a bill drawn by the principal for part of the price of the goods, it is not so found here, on the contrary the claim is in respect of general advances; and if it had been so found, I do not say that it would have made any difference. It has been said that as a general rule it would be for the benefit of the consignor, that the factor should have authority to pledge; that I deny; for it would not be for the benefit of the consignor that a factor should have authority to pledge for his own debt. But it is unnecessary to discuss that point, as it is quite clear, that unless the consignor abroad gives the factor a special authority to pledge, he has no such authority himself.

Judgment for the Plaintiff.

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The KING *against* The Inhabitants of the Township
of BRADFORD.

Saturday,
Feb. 6th.

UPON appeal against an order of two justices for the removal of *Thomas Holgate*, his wife and children, from the township of *Bradford* to the township of *Thornton*, both situate in the West Riding of the county of *York*, the court of quarter sessions discharged the order, subject to the opinion of this Court upon the following case: The pauper, *Thomas Holgate*, being upwards of 22 years of age, by indenture bearing date the 3d of *April* 1805, bound himself apprentice to *David Fawcett*, of *Bradford*, for the term of three years and twenty-one weeks, in which indenture was a covenant in the following words, "He the said *Thomas Holgate* doth agree to allow his said master two shillings per week weekly and every week, and to have (leaving a blank) wages, and provide for himself for the abovesaid term." The pauper duly served his master for the above term in *Bradford*, and the two shillings a-week agreed to be allowed, were regularly deducted out of the wages, which he constantly received during his service. The indenture was upon a 15s. stamp, and it was objected on the part of the respondents, that the 44 G. 3. c. 98. (a) required

In an indenture of apprenticeship a covenant by the apprentice to allow his master 2s. per week, and to have wages and provide for himself during the term, does not require the additional stamp required by 44 G. 3. c. 98, upon an indenture where a sum of money is contracted for with the apprentice.

(a) The 44 G. 3. c. 98. §. 2. enacts, that from and after the 10th day of *October* 1804, there shall be raised, levied, collected and paid in *England* unto his majesty, his heirs and successors, for and in respect of the several instruments, articles, matters and things mentioned, enumerated, and described in the schedules marked A and B thereunto annexed, the several sums of money and duties as they are respectively inserted, described, and set forth in the column of the said schedules marked A and B, intituled *England*. The schedule A annexed to the

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quired a stamp of 1*l.* 10*s.*, and therefore the indenture was void.

Burrough and *Hullock* in support of the order of sessions, contended that the agreement by the pauper to allow his master 2*s.* per week did not require an additional stamp, because it did not come under the meaning of the words in the schedule, as a sum or value contracted or agreed for with the apprentice, which words are the same as those used in the stat. 8 *Ann. c. 9. s. 32.*, and relate only to money contracted for by way of premium to the master. [Lord *Ellenborough* C. J. interrupted them by observing that the master of an apprentice is by law entitled to the whole of his earnings, and asked whether this amounted to any thing more than his remitting a part of them instead of taking the whole.]

Scarlett, contra, admitted that if the Court viewed the case in that light it would fall within the authority of *Rex v. Wantage* (a); but he submitted that this was to be considered as an agreement to allow the master 2*s.* per week ultra the amount of the apprentice's earnings, which the master was still entitled to take, there being no clause in the indenture to restrain him. The meaning therefore of the agreement, as appears by the contract, was this, that the master should allow wages in confi-

(a) 1 *Kast*, 601.

act, contains the following: "indenture of apprenticeship, where the sum or value given, paid, contracted, or agreed for with or in relation to such apprentice, shall not exceed 10*l.*—15*s.*; exceeding 10*l.* and not exceeding 20*l.*—1*l.* 10*s.*"

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deration of the apprentice providing for himself, deducting out of those wages 2s. per week, which was a benefit resulting to the master.

LORD ELLENBOROUGH C. J. If the words of the covenant were transposed, they would run thus, the pauper to have wages and to allow his master 2s. per week, and then there would be no doubt of their meaning an allowance out of the wages simply, and what difference does the order in which they now stand make in the sense? It therefore can never be considered as a boon to the master, who, instead of having the labour of his apprentice for nothing, which he was entitled to have, agrees to pay him wages, deducting 2s. per week out of them.

LE BLANC J. The master had a right to the whole of the earnings, but allows, by way of wages, such a sum as they are computed at minus 2s. per week on account of his providing for himself.

BAYLEY J. concurred.

Order of Sessions confirmed.

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Where the pauper having a freehold estate in the parish of *A.* which he had let for 50s. per annum, rented a tenement in the parish of *B.* of the value of 8 guineas per annum, and resided there 40 days: held that he did not gain a settlement in *B.*; as he could not be considered as the occupier of the freehold estate.

HENRY BREWITT, his wife and family, were removed by order of two justices from the parish of *Fobbing* to the parish of *South Bemfleet*, both in the county of *Essex*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case.

The pauper *Henry Brewitt* being legally settled in *South Bemfleet*, left that parish and went to *Fobbing*, where he rented and lived 40 days in a house of the value of eight guineas per annum, having previously to and at the time of his quitting *South Bemfleet*, and during his residence in *Fobbing*, and when the order of removal was made, a freehold estate in *South Bemfleet* which he had let at the rent of 2*l.* 10*s.* per annum.

Pooley and *Walford*, who opposed the order of sessions, were called upon by the Court, and contended that by coupling the interest of the pauper in the freehold with the renting of the leasehold, he gained a settlement in *Fobbing* within the meaning of the stat. 13 & 14 *Car.* 2. The words of that statute are "coming to settle in any tenement," which means any property that in point of law is a tenement; they are therefore large enough to embrace the freehold as well as leasehold interest of the pauper, which taken together are of the value of 10*l.* a-year. A person in the occupation of such a tenement is not likely to be chargeable, and therefore not an object of removal contemplated by the act. According to

Lord *Hardwicke* in *R. v. Sandwich* (a), “the ability of the person to occupy a farm or tenement of the value of 10*l.* a-year, shall exclude the presumption of his being likely to be chargeable;” and in *R. v. Fillongley* (b), *Aspburft* J. said, “If a man has sufficient credit to be trusted with a tenement of 10*l.* a-year, even out of charity, that is sufficient to answer the intent of the statute, because such a person is not likely to become chargeable.” If that be so, it would be strange if a person who has an interest in a freehold estate should be held likely to be chargeable. As to the case of *Rex v. South Lynn* (c), where it was said that the party must stand in the relation of tenant to the property; that was only in allusion to the particular circumstances of that case. *Rex v. Donnington* (d), and *Rex v. Culmstock* (e), shew that the occupation of a leasehold may be coupled with the possession of a freehold. [Lord *Ellenborough* C. J. Those were all cases of occupation; but is there any case which shews that an occupation as tenant may be coupled with an interest as landlord?] An actual personal occupation of the whole is not necessary; a legal occupation as to part is sufficient, according to *Rex v. Llandverras* (f), where the pauper had underlet a part of his tenement, and resided on the remainder only, yet he was held to have gained a settlement in respect of the whole. In that case indeed the tenement was wholly leasehold; but the same rule applies à fortiori where it is partly freehold. [Lord *Ellenborough* C. J. There the whole tenement was in the same parish.] That was held to be unnecessary in *Rex v. Donnington* and *Rex v. Culmstock*.

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(a) *Burr.* S. C. 44.(b) 1 *T. R.* 460.(c) 5 *T. R.* 664.(d) *Bott*, 5th Ed. 121. *Burr.* S. C. 744.(e) 6 *T. R.* 730.(f) *Burr.* S. C. 571. *Bott*, 5th Ed. 134.

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[Lord *Ellenborough* C. J. But in those cases there was an actual occupation of the whole.]

LORD ELLENBOROUGH C. J. It is unnecessary to hear the other side. This can never be called an occupation of a freehold interest; where there was no occupation in fact, it being leased out to another, and without some occupation the pauper cannot gain a settlement. The cases have already gone far enough; the mode of reasoning adopted to-day would go to shew that having any interest whatsoever was an occupation; and if pushed a little farther would take in property in the funds.

LE BLANC J. The words of the statute are “ come to settle in any tenement,” which have been sufficiently departed from already, when it was decided that if a person take a tenement of the value of 10*l.* a-year, and underlet a part, he will thereby gain a settlement; but the ground of that decision was that he had credit to be trusted with 10*l.* a-year. Here, however, the pauper had only credit for a less sum than 10*l.*, viz. 8 guineas a-year. But it is said he had property of his own elsewhere; of that, however, he was not the occupier; but an ingenious argument is raised from what fell from the Court in other cases to shew that the principle of those cases is applicable to this, where he never occupied to the value of 10*l.* a-year, because it is said that he was not likely to be chargeable; but it is sufficient to say that those cases are not like the present, and that there is no case which seems to have gone the length contended for.

BAYLEY J. According to the argument, if a person having property of his own of 5*l.* a-year value in *Cornwall*, leased it out and came to occupy a tenement of 5*l.* a-year in *London*, that would be coming to settle on a tenement of 10*l.* a-year, and the party would gain a settlement in *London*. Such a construction of the act would be a violent departure from the words of it.

Order of Sessions confirmed.

Nolan, *Knox*, and *Trollope* were in support of the order.

WILSON and Others *against* KYMER, M'TAGGART, and Others. *Monday, Feb. 8th.*

THE plaintiffs declared as owners of the ship *Harmony*, for the freight of a certain quantity of sugar and rum from *St. Croix* to *London*, and stated that the master signed bills of lading for the same deliverable to *Williams* and *Wilson* or their assigns, he or they paying freight for the said goods; that the ship arrived on the 1st of *July* 1810, of all which the defendants had notice. That the said bills of lading were indorsed by *Williams* and *Wilson*

Where the consignees of a *West India* cargo deliverable by bill of lading to them or their assigns, he or they paying freight for the same, indorsed it to the defendants, their brokers, for advances made by them

and the cargo on its arrival was landed at the *West India* docks in the names of the consignees, but was entered at the custom-house by the defendants in their own names; and afterwards the defendants obtained delivery from the *West India* docks under an order from the consignees for that purpose, and not under the bill of lading: Held that the receipt of the cargo by the defendants under the order of the consignees was not a sufficient ground to raise an implied assumpsit on their part to pay the freight, and the entry at the custom-house made no difference; but as it appeared from previous dealings that the defendants had been in the habit of receiving goods in the same manner and paying the freight for them, that was considered sufficient to raise such an implied promise. The lien of the plaintiffs (the ship-owners) for freight continued after the landing of the cargo at the *West India* docks, although they did not give notice to the company to retain the cargo until payment of the freight.

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to the defendants, who thereby became the assignees of *Williams* and *Wilson* in that behalf, and owners and proprietors of the said goods; and thereupon in consideration of the premises, and that the plaintiffs as such owners of the ship, at the special instance and request of the defendants, would deliver the said goods from and out of the said ship to the defendants under the said bills of lading, the defendants undertook and promised the plaintiffs to pay them freight for the said goods according to the said bills of lading. That the plaintiffs confiding in the said promise and undertaking, did deliver the said goods out of and from the said ship to the defendants under the said bills of lading; and although the defendants had and received the said goods out of and from the said ship under and by virtue of the said bills of lading, and the freight according to the said bills of lading amounted to 3000*l.*, yet the defendants did not, although requested, pay the said freight, &c. There were several other counts, and amongst them the fourth count was in the common general form, that the defendants on the same day, &c. were indebted to the plaintiffs in 3000*l.* for certain freight due and payable from the defendants to the plaintiffs in respect of certain goods before that time carried on board a certain other ship from *St. Croix* to *London*, and delivered at *London* to the defendants and at their request: and being so indebted the defendants in consideration thereof promised to pay it. There were also the common money counts.

It appeared in evidence before Lord *Ellenborough* C. J. at the trial in *London*, that the ship *Harmony* was let to freight by the plaintiffs to a house at *Liverpool*, now under the firm of *Williams* and *Wilson*, to whom the goods were consigned, and who received the bills of lading

lading for the same, which were in the usual form to deliver the goods to *Williams* and *Wilson* or their assigns, *he or they paying freight for the same*. The defendants were considerable brokers in *London*, and being very largely in advance to *Williams* and *Wilson*, by whom they were employed as brokers, took from them by way of security the bills of lading, and afterwards made further advances upon them, which bills of lading *Williams* and *Wilson* indorsed to them *before* the arrival of the *Harmony*, which was reported at the custom-house in *London* on the 19th of *June* 1810, after her entrance into the *West India* docks. The entry was made at the custom-house by the defendants in their names, and they paid the duties; but under their direction the goods were landed on the quays at the *West India* docks in the names of *Williams* and *Wilson*, their names being in the manifest as consignees. An application was made for the freight by the ship-brokers for the plaintiffs to the defendants as brokers for the consignees in *August* 1810, and the defendants referred them to the consignees at *Liverpool*, to whom the plaintiffs then addressed a letter, dated 7th of *September* 1810, demanding 2904*l.* 19*s.* 3*d.* as the amount of the freight. Soon afterwards *Williams* and *Wilson* became bankrupts, and the plaintiffs proved this as a debt under their commission on the 4th of *May* 1811, and stated that their demand arose under the charterparty of 3d *October* 1809. On the 3d of *July* 1810, the order of *Williams* and *Wilson* to the *West India* Dock Company for the delivery of the goods to the defendants was received by the officer at the docks, which order was to the following effect: "To the directors of the *West India* Dock Company. Please to deliver to Messrs. *Kymer* and Co., or their order, the following

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lowing goods consigned to us (inter alia) the cargo of the *Harmony*." (Signed *Williams* and *Wilson*.) Under this order the goods were transferred to the defendants, and were afterwards sold by them in the course of *July* and *August*, and the amount credited by them to *Williams* and *Wilson*'s account. It was objected that the action would not lie against the defendants, but should have been brought against *Williams* and *Wilson*, who were the consignees, and to whose order the goods were delivered to the defendants as their brokers, and that the entry of the goods at the custom-house in the defendants' names would not make them liable; and *Roberts v. Holt* (a), *Artaza v. Smallpiece* (b), and the case of the *Theresa Bonita* (c), were cited in support of this objection. There was also another objection made, viz. that the plaintiffs had parted with their lien by landing the goods at the *West India* docks, and therefore there was no continuing lien at the time of the delivery to the defendants, the parting with which, where it still continues, may be a good consideration to raise an implied assumpsit to pay the freight, against the person in whose favour the lien is relinquished. Lord *Ellenborough* C. J. upon the last objection stated to the jury that as the goods were removed out of the ship and deposited at the *West India* docks by act of law, he was of opinion it ought not to operate to the prejudice of the plaintiff's lien, which therefore still subsisted; and upon the first objection he left the question to the jury, whether the defendants had promised to pay the freight in consideration of the plaintiffs' having waved their lien, which promise his Lordship was inclined to think might be

(a) 2 *Show.* 443.(b) 1 *Esq. N. P. C.* 23.(c) 4 *Rob. Adm. Rep.* 236.

implied from the circumstances. The jury found a verdict for the plaintiffs.

The case afterwards came before the Court in last *Michaelmas* term, upon a rule nisi which had been obtained in *Easter* term for a new trial, when the objections above stated were more fully considered.

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Park, Marryat, and Campbell, who shewed cause, contended against the last objection, that the 45 G. 3. c. 58. §. 15. (local act), relating to the *London* docks, which was in *pari materia* with the 39 G. 3. c. 69. (the *West India* dock act,) had expressly reserved the same lien for freight in favour of the owners of ships out of which goods should be landed, as they were subject to whilst on board the ship, and that even without such express reservation, the goods having been landed in compliance with the requisitions of an act of parliament, the lien would have been preserved, according to what was said by Lord *Kenyon* C. J. in *Ward v. Felton* (a). The *West India* docks therefore are for this purpose to be considered in all respects as the ship, and the persons who first take the goods from thence, as the persons into whose hands they first come by delivery from the ship. On the second point they contended, that justice required that the defendants, who had consented to become indorseees of the bill of lading from *Williams* and *Wilson*, and had derived all the benefit from the delivery of the cargo, should be liable to the payment of the freight. With respect to *Artaza v. Smallpiece*, and the case of the *Theresa Bonita*, they were over-ruled by *Cock v. Taylor* (b), which is an authority to shew that the defendants are liable

(a) 1 *East*, 512.(b) 13 *East*, 399.

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in this case. [*Bayley* J. 'There the delivery to the defendants was under the bill of lading; here it is under the order of *Williams and Wilson*.] That makes no real difference; for the defendants by consenting originally to accept the goods under the bill of lading, became liable for the freight, and cannot divest themselves of that liability by obtaining a subsequent order under which they received the goods. The case of *Roberts v. Holt* has no bearing upon this: it only decides that the consignee is liable for the freight on receipt of the goods, which does not appear to have been decided before that time. In *Ward v. Felton* the bills of lading were not indorsed to the defendant, and the master knew that he acted only as agent for the consignee, in making the entry at the custom-house; therefore, he was clearly not liable for the freight.

The Solicitor-General and *Puller*, contra, contended that the 39 G. 3. c. 69. s. 87., which imposes the necessity of landing the cargo at the *West India* docks, is totally silent with respect to the continuance of the lien; and supposing that the 45 G. 3. c. 58. s. 15. applied to this case, still it would not help the plaintiffs' claim, as it related only to a particular case recited in it, viz. where the duties are not paid, and where the goods are landed by the officer, in which case the company is authorized, upon notice given to them by the master or owner, to detain the goods until the freight is paid; but here the plaintiffs have given no notice. The plaintiffs might have secured the freight either by entering the goods at the *West India* docks in their own names, or giving notice to the dock company to retain. [*Lord Ellenborough* C. J. The clause is general as to the continuance

of the lien, and it would be too narrow a construction to confine it to the particular case where notice is given, which is only to aid the party in enforcing such lien; but independently of that clause, I should hold that if goods are taken out of the hands of the party by operation of law, he shall not be prejudiced by it, but the law will retain his lien for him. Is not this point incontrovertible, that when goods on board a ship are subject to lien, if they are taken out of the ship in invitum and by compulsion of law, that the lien shall be preserved in the place of safe custody where the goods are deposited by law? It seems a principle of universal justice, and there was no occasion for the act to provide for it. *Le Blanc J.* The operation of the clause which has been alluded to is to place goods landed under the regulations of that act in the same situation as if on board the ship. The 39 G. 3. c. 69. s. 87. & 98. require *West India* ships to land their cargoes at the docks under the penalty of forfeiture, which is a landing by compulsion of law.]

On the second point, they contended that *Cock v. Taylor* was mainly distinguishable from this, because in that case there was a taking of the goods by the defendant under the bill of lading, and that was held to be evidence against him of an agreement to pay the freight due on the goods, which by the bill of lading were deliverable only to the consignees or their assigns, upon payment of the freight. But here the receipt of the goods was under the order of *Williams and Wilson*, and cannot be evidence against the defendants, who received them under that order only; and not under the bill of lading, that they had agreed to receive them under the terms of the bill of lading. If it could be, then if these goods

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had been sold through several hands whilst remaining in the *West India* docks, the purchaser who received them from the docks would be liable for the freight, although he had given a full price for them, under an ignorance that the freight had not been paid, which would be a most inconvenient rule of commerce. As to the case of *Lodergreen v. Flight*, cited in *Cock v. Taylor* (a) it only decided that the contract for freight being entire, the captain had a lien for the whole freight on the remainder of the cargo, after a part delivery of it, but there it appeared that the defendant who was held liable, had received the goods under the bill of lading. The making the entry at the custom-house in the names of the defendants, according to *Ward v. Felton* will not make them liable. [Lord *Ellenborough* C. J. 'That was certainly done alio intuitu.']

LORD ELLENBOROUGH C. J. There is certainly one circumstance in this case which forms a material distinction between this and the case of *Cock v. Taylor*, and which seems to influence the judgment of my brethren, and therefore I should wish the case to go to a new trial, in order to enquire into the fact on which that distinction is founded, and then, if it should be deemed necessary, to consider farther of that distinction. The circumstance is this, that in *Cock v. Taylor* the goods were delivered under the bill of lading only; here they were delivered to the defendants, who were entitled to have them under the bill of lading, and might have enforced their delivery under it, and from whom they might have been withheld until the freight was satisfied: but it is said they obtained possession of them under an order

(a) 13 *East*, 403.

for delivery from the consignees, which imports that the consignees still continued the proprietors, and not under the bill of lading, although they were indorseees of the bill of lading at the time. Then the question is, can the law extend the lien as against persons who do not claim in that character under which they would be liable for freight, viz. as indorseees of the bill of lading, but as the agents of the consignees, so as to make the parting with the lien to them a ground of consideration for an implied assumpsit by them to pay the freight? That would be carrying the law one step farther than was done in *Cock v. Taylor*, and in a case of lien we should be anxious to tread cautiously and on sure grounds before we extend it beyond the limits of decided cases. It struck me at the trial that the defendants, being indorseees of the bill of lading, if they took the benefit derived under it, not having renounced their claim as such indorseees, must be considered as taking under it, and chargeable according to the terms of that instrument, which was essential to their title and which gave them the means of enforcing the delivery; but what weighs with the Court is this, that they obtained the goods not by the strength of their title as indorseees, but as agents or servants of the consignees. The Court therefore think it right that it should go down again in order to see if that fact can be varied.

GROSE J. There is a very material difference between this case and *Cock v. Taylor*. This appears to me to be a new case.

LE BLANC J. It would be carrying the authority of *Cock v. Taylor* further than was intended or foreseen at

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the time when that case was decided, to hold that it governed the present. It is easy to raise an implied assumpsit where the parties are cognizant of the terms on which they are dealing, as where the dealing is between the owner or captain and the defendants, but it is not so easy where the dealing, as in this case, is between the owners and a third party, viz. *Williams* and *Wilson*, for I conceive that here the owners must be taken to have delivered the goods on the faith of *Williams* and *Wilson*.

BAYLEY J. I think *Cock v. Taylor* was rightly decided. In that case the defendant received the goods as a purchaser of the bill of lading, making that his title to them, and virtually consenting that his name should be pledged to the owner for the freight; but here it seems to me the defendants never did consent to that, but standing in a situation in which the owners might have had their names pledged if they had claimed under the bill of lading, they adopted the alternative in which their names were not to be pledged to the owners. Instead of going with the bill of lading they go with the order of *Williams* and *Wilson*, and obtain a delivery under it, in their names, as the persons who were to be pledged, and to whom the captain would consent to look for the freight. It strikes me, therefore, that *Williams* and *Wilson* are the only persons to whom the captain has a right to look: and that appears to be an essential distinction between the two cases.

The Court thereupon made the rule absolute for a new trial, and the cause went down again and was tried before Lord *Ellenborough* C. J. at the *London* sittings in this term, when the same evidence was given as before, with
 this

this additional proof, that the defendants had upon former occasions obtained the delivery of other goods under similar orders from *Williams* and *Wilson*, on which occasions they had always paid the freight. Lord *Ellenborough* C. J. then told the jury that the privity of contract under a bill of lading subsisted between the shipper of the goods and the captain; that the captain and his owners had a lien for the freight of such goods, not only whilst they remained on board the ship, but also in the *West India* docks; that such lien might be waved, or the goods might be delivered upon an understanding that the freight should be paid, in the same manner as if the goods had been retained for the lien; and that such an understanding might form a good consideration for a promise to pay the freight, which promise might be implied from the circumstances: that it was for the jury to consider whether from the former habit of dealing and the usage of trade they would imply such promise. The jury, as upon the former trial, found a verdict for the plaintiffs.

The Solicitor-General on this day moved for a new trial, insisting as before that as the defendants had obtained the goods under the order of *Williams* and *Wilson*, and not under the bill of lading, no privity could be inferred between the plaintiffs and defendants to raise an implied assumpsit between them; and that as the Court had decided that the authority of *Cock v. Taylor* did not support the former verdict, so neither did it the present.

LORD ELLENBOROUGH C. J. If there were any point of law on which I entertained a doubt, I should be desirous of having the case reconsidered, but I am not aware that there was any point of law which could have

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been presented to the jury otherwise than it was. Then the question is, taking what has been the dealing between these parties and the general usage of trade, whether the defendants, who received these goods, must not be taken to have received them under the same terms that they had always adopted in other cases, viz. under the same liability to pay the freight as the original consignees were under. I left it to the jury to consider whether from the evidence given of the general habit of dealing between the parties, these goods were delivered on an implied understanding that the same course was to be pursued with respect to them.

LE BLANC J. This is not moved upon any question whether the law was properly stated to the jury, nor is it a question now, whether a person merely taking goods under an order for delivery, without any previous dealings of the same sort, would be liable for the freight; for the Court intimated on a former occasion that he would not, and therefore sent the case down to a new trial to ascertain whether on account of any previous dealings between the parties, there was any understanding between them that the defendants should be liable for the freight. It now appears that the defendants uniformly paid the freight for the goods which they received on former occasions. Then the question is, whether the defendants, who appeared to act in the same character upon this as upon former occasions, and did not communicate that they were acting in a different character until after they received the goods, were not to be understood as receiving them upon the same footing as before, *i. e.* upon an understanding that they would pay the freight. That was left to the jury, and they have found that there

there were such previous dealings, and from thence have implied the undertaking. There is no question of law to be considered; but the case, if sent down again, must be decided upon the same facts as now appear.

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BAYLEY J. The verdict is certainly according to the justice of the case. The defendants were in the habit of receiving goods and paying the freight for them, and when they received the goods in question, knew that the freight had not been satisfied. They could not have meant then in this particular instance to turn the owners of the ship round upon *Williams* and *Wilson*, but must be understood as having agreed to pay the freight as upon former occasions, when the captain was used to send round to them for it; and they cannot be prejudiced by this, because they have got the goods.

Rule refused.

HILHOUSE and Others *against* DAVIS.

Monday,
Feb. 8th.

DEBT. The second count of the declaration on which the question arose, stated that on the first of September, 50 G. 3., at the assizes at *Bristol*, held before *Wood B.*, a jury qualified, &c. was sworn and impanelled, &c. according to the act of the 43 G. 3. c. 140. (a) (local and personal) for improving and rendering more commodious the port and harbour of *Bristol*, and to the act of the 48 G. 3. c. 11. (b), for completing the im-

In an action of debt to recover a sum awarded to the plaintiffs by a jury under the 43 G. 3. c. 140., and 48 G. 3. c. 11., as a compensation to be made by the *Bristol Dock Company* for an injury done to the plaintiff's property by means of the works authorized by those acts: Held that the jury might give interest for the detention of the sum awarded.

(a) Sect. 44 107, 8. and 154.

(b) Sect. 28, 9.

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provement of the port of *Bristol*, to assess and award the sum of money to be paid, and compensation to be made by the said *Bristol* Dock Company to the plaintiffs, for an injury sustained by them as occupiers of and persons interested in certain property known by the name of the Lime-kiln Dock, together with other property adjoining the same, in that part of the parish of *Clifton* which is in the county of the city of *Bristol*, by means of the works and improvements authorized to be made by the several acts of parliament made for improving the port of *Bristol*, as claimed by a certain memorial of the plaintiffs, presented to the said Company in that behalf: and that the said jury so sworn, &c. awarded the sum of 4238*l.* to be the sum to be paid and compensation to be made by the said Company to the plaintiffs for the said injury, &c. by reason of the said dock and premises having been injured and rendered useless by means of the said works and improvements: and thereupon the said Sir G. *Wood* did give judgment for the said 4238*l.* so awarded, &c.: and it was considered by the said Judge of assize that the plaintiffs should recover against the said *Bristol* Dock Company the said sum of 4238*l.*, and that the said sum should be paid by the said Company as and for the amount of the compensation aforesaid. The declaration then averred a demand and non-payment of the said sum of 4238*l.*, to the plaintiffs' damage of 500*l.* Plea, nil debet.

At the trial before *Chambre J.*, at the last assizes for *Bristol*, the record stated in the declaration was produced from the quarter sessions, and the learned Judge's signature thereto was proved; and it was also proved that the plaintiffs had demanded payment of the sum assessed from the defendant, who was treasurer of the Dock Company,

pany, which was refused, and a resolution of the Company was passed, stating that they could not fix on any definitive time to pay the money. The learned Judge directed the jury that they might give damages for the detention of the debt, and that the natural criterion of those damages was the interest on the sum awarded by the jury. Whereupon the jury found a verdict for the debt and damages, which included interest on the sum awarded.

In *Michaelmas* term a rule nisi was obtained by *Lens Serjt.** for reducing the verdict to a sum exclusive of the interest, on the ground that the jury were not authorized to give interest, but only nominal damages.

Pell Serjt., *Burrough*, and *Abbott*, now shewed cause, and contended that the assessment made under the act of parliament was equivalent to a judgment. The first act relating to these docks gave jurisdiction to the sessions, who were directed to enter the judgment: then came this act, which gives the same jurisdiction to a judge of assize. Here the judge has accordingly pronounced judgment, and that judgment is conclusive. The jury therefore were at liberty to give interest in an action brought upon it, in the same manner as it has been held they may do in actions brought upon regular judgments, *Entwistle v. Shepherd* (a), *McClure v. Dunkin* (b); in which latter case the interest given exceeded the penalty of the bond; and therefore could not have been recovered in the original action. And according to *Blackmore v. Flemmyng* (c), even on a writ of inquiry, the jury may allow interest upon the judgment. [*Le Blanc J.*

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(a) 2 T. R. 78.

(b) 1 East, 436.

(c) 7 T. R. 446.

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The difficulty is, that this is not a judgment of any Court; what sort of judgment then can it be called? A judge of assize cannot, as such, pronounce a judgment. Lord *Ellenborough* C. J. The act is very defective; but it seems only to be an ascertainment of damages under the authority of a judge of assize]. Supposing this assessment not to amount to a judgment, it at least became a liquidated debt from the time of its ascertainment, and by the rule of the common law it is within the general province of a jury to give damages for the detention of a debt. Then if they were competent to give such damages, there can be no doubt of the propriety of giving them; for the act has expressed that they shall give a just and liberal compensation, which cannot be done without allowing interest for the money withheld. Besides, the assessment, although in the form only of damages for an injury, is in substance an equivalent for property of which the plaintiffs have been deprived by the Company; it is therefore like a case of sale, in which it is clear that interest would be due for the time that the purchase-money is withheld. If interest be not recoverable, it will be allowing a premium to the Company for withholding the money.

Lens Serjt. and *Casberd*, contra. There was no evidence of the Company's having withheld payment through any fraudulent or contumacious motives; but their funds are defective. This assessment is compared to a debt or sale, but *nullum simile est idem*; and so it may be like both, without amounting to either, being in fact only a special conclusion of what compensation is due to the individual by way of damages for property taken from him for the public benefit. Then it is likened

to a judgment, to which the same answer may be given; neither if it resembled a judgment, is it a matter of course to allow interest upon all judgments; it is discretionary with Courts of Error, and in some cases they have disallowed it. In *Blackmore v. Fleming* it does not appear from the report whether the original cause of action was such as to bear interest. (*Abbott* said it was a tailor's bill.) *McClure v. Dunkin* was on bond, and *Entwistle v. Shepherd* appears to have been an action which originally bore interest. *Hunter v. Bowes*, MS. case from C. P. about two terms ago, was an action of assumpsit upon a foreign judgment; the defendant suffered judgment by default, and the jury, upon the writ of inquiry, gave interest; and the Court held that the jury had no authority to give interest, and reduced the verdict to that extent. With respect to this being a liquidated debt, it does not therefore follow that it will bear interest. In *Hogan v. Page* (a) it was held that interest ought not to be given on a single bond. So it is not allowable on money lent, *Calton v. Bragge* (b). It is not therefore enough to prove a sum of money due, unless it be due upon such grounds as will entitle the party to interest. That has not been shewn here; for as to the enactment respecting a liberal compensation, that is directory only to the compensation-jury, who must be presumed to have given a liberal compensation, attending to the probability of its not being paid for some time.

LORD ELLENBOROUGH C. J. This is a case perfectly new and anomalous in respect of any other proceedings. It is accompanied with this hardship to the plaintiffs.

(a) 1 B. & P. 337.

(b) 15 East, 223.

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that unless they can recover damages in this action for the detention of their debt they will be without remedy ; for by a strange omission in the act, there being no power given to this or any other Court to award execution, the plaintiffs may wait *ad Græcas calendæ* before they will be entitled to their remedy. Under these circumstances the plaintiffs here will be in a much worse situation than the plaintiffs in the case cited from the Common Pleas of the action on a foreign judgment, where they still had the means of levying by execution on that judgment ; whereas here, if there be no mode of obtaining the judgment of this Court for the damages, they can have no execution ; and the only way by which the Company can be deterred from withholding payment is by allowing interest in the shape of damages, or by an application to the legislature for that purpose. In this anomalous course of proceeding, and upon untrodden ground, I am almost afraid of adopting any thing which may seem like a general rule ; but it does appear to me that it will be in furtherance of justice, and the object of the legislature, to allow the plaintiffs the benefit of the interest assessed by way of damages in this action. We cannot indeed call it properly a judgment, it being rather a statutable ascertainment of damages ; but with some doubt, and for myself I confess considerable doubt in so pronouncing, we think that we shall be best sustaining the justice of the case by allowing the plaintiffs the amount of the interest assessed.

LE BLANC J. The jury having given interest, we cannot set their verdict aside without being satisfied that they have done what they were not warranted to do by law. But there is no positive rule of law against their giving

giving interest on a sum ascertained. The rule of law is affirmative that where a sum is ascertained, and judgment afterwards pronounced thereon in a court of record, if an action of debt be brought on that judgment, the jury may give interest by way of damages for the detention of the debt. The only question is, whether this may be assimilated to the case of an action on a judgment; and I think it fairly may. This was a statutable provision to relieve the Company from actions for damages to be done by them in the execution of the act. Now if in this instance an action had been brought, the plaintiffs would have recovered damages to the extent of the injury, and had judgment for those damages; but the legislature has appointed another course of proceeding, by assessment of damages before a Judge of assize, who is afterwards to give judgment as a sanction to the finding of the jury. It is an assessment in invitum, and the party in whose favour it is made has no mode of recovering it but by action of debt, and proceeding to judgment in a court of record upon that assessment; and then he may go on as in other cases. From the time of the ascertainment by the jury and the sanction of the Judge, it seems marked out as a stage of the proceeding corresponding with that of a judgment recovered in an action; and therefore, by analogy to that, it should seem that the sum ascertained will bear interest.

BAYLEY J. I cannot say the jury have done wrong; on the contrary, I think they were right. It is an assessment of damages before a Judge of assize, who afterwards gives judgment upon it, and that comes as near to what is properly a judgment as possible. Then the act says, the jury shall give a just and liberal compensation;

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tion; and the jury ascertained the sum of 4238*l.* to be a liberal compensation to be paid in 1810. The question therefore is, whether two years afterwards a jury were not warranted in concluding that the party is damnified by having been kept out of his compensation for so long a time: I think they were. But it is said this was no fault of the defendant: neither is this a proceeding against him as for a penalty, but only for the damages which the plaintiffs have sustained by reason of the delay of payment; and although that delay may have arisen from inability, the damage to the plaintiffs by the detention is the same. Then it seems that the interest upon the sum withheld is a reasonable measure of compensation.

Rule discharged.

Monday,
Feb. 8*th*.

RUMSEY, Assignee of Collins, a Bankrupt, against
GEORGE and Another.

Husband alone cannot be the petitioning creditor to support a commission of bankruptcy, in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife *dum sola*.

TROVER for goods the property of the bankrupt before and at the time of his bankruptcy, which the defendants had taken in execution subsequent to the act of bankruptcy. At the trial before *Chambre J.* at the last assizes at *Bristol*, the trading was admitted, and the other circumstances necessary to constitute a bankruptcy were fully proved, subject only to a question that arose upon the validity of the commission in respect to the petitioning creditor's debt. It appeared by the learned Judge's report, that the commission was obtained upon the petition of the plaintiff *Rumsey*; whose demands upon the bankrupt, as it was proved, arose in the following manner.

In *July* 1804 the bankrupt borrowed of *Mary Spencer*, widow, who afterwards and before the act of bankruptcy became the wife of *Daniel Rumsey*, (the plaintiff,) the sum of 90*l.*, for which he was to pay her interest by quarterly payments. This interest was often applied for, but never paid except once. After Mrs. *Spencer* married the plaintiff, application was again made for payment, and an answer received from the bankrupt that he could not then discharge it, but would as soon as he was able. As the act of bankruptcy was not committed until about *May* or *June* 1809, the debt of 90*l.* with the interest most probably exceeded 100*l.*; but it was also proved that a farther debt was contracted with the plaintiff himself, by a promissory note from the bankrupt, dated 11th *February* 1809, for 25*l.* 4*s.*, and payable to the plaintiff or order, with interest from the date. The affidavit of debt was made by *Rumsey*, and stated that the bankrupt was indebted to the deponent in the sum of 150*l.* for money lent by the deponent and his wife previously to her marriage, and for interest due thereon. Upon this part of the case it was objected by the defendant's counsel, that the debt of 90*l.* and interest remained a debt due to the wife: that the husband could not have sued for it without joining his wife in the action, and that the right would survive to the wife upon her husband's death before the debt was recovered, and therefore it was not a debt to the husband to entitle him alone to become the petitioner for a commission of bankruptcy: and they cited the case *Ex parte Staples (a)*, where the debt was due to the wife as administratrix. The question was reserved for the decision of the Court; and after the

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other parts of the case had been proved, the plaintiff was nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for 118*l.* damages. Accordingly *Lens* Serjt. having in *Michaelmas* term obtained a rule nisi for that purpose,

Pell Serjt. and *W. E. Taunton* shewed cause, and admitted that they were not able to find any case precisely in point, but contended that the principle of those cases applied in which it had been decided that the wife must be joined with the husband in all actions for debts due to her *dum sola*; and for this they referred to *Fenner v. Plaskett* (a), 1 *Roll. Abr.* (b), *Garforth v. Bradley* (c), *Bull. N. P.* (d), *Milner v. Milnes* (e). So where a debt is due to the wife as administratrix, the husband alone cannot make oath of this being a debt due to himself in order to found a commission of bankruptcy, *Ex parte Staples* (f): for which purpose also it is necessary that the debt should be a legal debt, *Ex parte Hillyard* (g), *Medlicott's case* (h). Here the legal debt was not due to the husband alone, but to the husband and wife in right of the wife; and if the husband had died, leaving the wife, it would have survived to her, *Garforth v. Bradley*. They referred also to 2 *Vern.* 707., *Anonym.*, and *Co. Lit.* 351. b., as authorities to shew that choses in action belonging to the wife do not vest in the husband, unless reduced by him into possession during the coverture.

Lens Serjt. and *Richardson* contra. The only case in point for the defendant is the case *Ex parte Staples*, which

(a) *Moor.* 422.

(d) *P.* 179.

(g) 2 *Ves.* 407.

(b) *P.* 347. *R.* pl. 3.

(e) 3 *T. R.* 631.

(h) *Str.* 899.

(c) 2 *Ves.* 676, 7.

(f) 7 *Vin. Abr.* 67. pl. 10.

turned upon the distinction of the debt being due to the wife as administratrix. [*Le Blanc* J. referred to the case of *Master v. Winter* (a), cited in *Davies*.] There also the wife was executrix, and the same distinction was taken, that as the debt was due to her in autre droit, she ought to have joined with her husband in suing out the commission : and the reason given in *Ex parte Staples*, that the husband alone could not make oath of this as a debt due to himself was true, for he could never have applied it to his own use. But here the husband claims a debt due to the wife proprio jure, and may apply it to his own use, and therefore he is competent to make affidavit that it is his debt, and so the reasoning of that case does not apply. The wife could not have been the petitioning creditor ; for the same statute which requires the oath requires also the petitioner to give a bond (b), which a feme covert is not competent to give. It is true indeed that, generally speaking, the husband must join his wife in actions upon debts due to the wife ; but that is not so always ; and in *Brett v. Cumberland* (c) it is laid down by *Dodderidge* J. as a rule to be observed, that the husband may well have an action in his own name without his wife for the recovery of that which he may discharge alone, and of which he may make disposition to his own use. Besides here it appears that there was a forbearance by the husband after the coverture ; and in the case of a feme covert executrix, it was held that the husband alone may maintain an action on a promise in consideration of forbearance (d). A fortiori then he may

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(a) 2 *Montag. Bankt. Cases*, 129.(b) 5 *G. 2. c. 30. s. 23.*(c) 3 *Bull.* 164.(d) 1 *Salk.* 117., and *Carth.* 462.

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do so, where the debt is due to himself, as in the present case.

LORD ELLENBOROUGH C. J. A consideration of forbearance by the husband is a consideration arising during coverture, and expressly moving from the husband, who has the power of immediately enforcing the claim, and is therefore sufficient to support a promise made to him alone, who is the instrument of forbearance. But that question does not arise: the question here is whether, in the case of a debt belonging to the wife antecedently to coverture, the husband can treat it as his own debt, when the law does not consider it as his own absolutely, but only potentially so, *i. e.* provided he reduce it into possession during the coverture. It is quite clear that this debt would have survived to the wife. Then we are to consider what description of debt is necessary to support a commission of bankruptcy. The cases say that it must be a legal debt. Is this so? Is the sum of money which was due to the husband and wife legally the debt of the husband; and can he, under a statute which requires him to make affidavit of the truth and reality of his debt, swear that this is his debt? I think he cannot. The reason assigned in the case of the executrix, of its being a debt due to her in autre droit, certainly does not much advance the argument in this; and therefore I do not form my opinion on that case: but I take a distinct ground, *viz.* that this was not the debt of the husband, but of the wife. With respect to debts due to the wife, the husband is her irrevocable attorney, if I may so say; and if he reduce them into possession during the coverture, they become his debt; but until

that is done, they remain the debt of the wife, and all the cases agree that in the event of his death, they would survive to her. As to the other sum of money which was clearly due to the husband, the two debts cannot amalgamate and unite together, so as to form one debt of the husband. That being so, I think that the husband alone could not make affidavit of this being his debt, because that by reducing it into possession he might have made it his.

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LE BLANC J. I think the nonsuit was right. Two cases have been cited, where although the character of the parties was different, yet the principle applies. One of these cases was determined in a court of equity, the other in a court of law, where the same objection was insisted upon as in this case. As to the argument that the wife could not join as petitioning creditor because she could not give a bond, that would have held equally where the wife was executrix or administratrix, for there the husband only could enter into the bond. I do not see therefore that that circumstance will prevent the husband and wife from being petitioning creditors; and if the debt must be a legal debt in order to support a commission, this cannot be considered as the debt of the husband, until he has reduced it into possession.

AYLEY J. concurred.

Rule absolute.

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Tuesday,
Feb. 9th.SLAUGHTER *against* CHEYNE and BRYANT.

A deed of composition embracing *all the creditors*, under which many of them came in, is in case of a subsequent commission of bankruptcy, such a "compounding with his creditors," as will within the stat. 5 G. 2. c. 30. § 9. deprive the bankrupt of the benefit of his certificate to protect his future effects from being liable to be taken in execution, although some of the creditors did not come in under the deed of composition.

THE defendant *Bryant* in 1806 entered into a deed of composition with his creditors for payment of a composition of 10s. in the pound as far as his effects would extend, and under that deed, which embraced in its terms *all the creditors*, many of them came in, but some refused, and sued him and were paid. On the 16th of November 1811 a commission of bankruptcy issued against him, under which he obtained his certificate on the 23d of April 1812. The plaintiff's execution in this action, which was for a cause of action arising prior to the commission of bankruptcy, was executed on the 8th of December 1812, upon goods obtained by *Bryant* after his certificate. Under these circumstances *Bryant* obtained a Judge's summons for staying proceedings on the *fi. fa.* as to the goods obtained after his certificate, which was opposed on the ground that he had compounded *with all his creditors*, and the learned Judge declined making any order thereon.

Lawes now moved to set aside the execution levied on the defendant *Bryant's* goods, and to restore to him 150*l.* 3*s.* paid thereon into the hands of the sheriff of *Middlesex*, upon an affidavit disclosing the above circumstances. He contended that the certificate obtained by the defendant under his commission was a discharge of his future effects from liability, and that according to the case of *Norton v. Shakespeare (a)*, the prior composition

(a) 15 *East*, 619.

with his creditors would not defeat the effect of that certificate, because as all the creditors did not come in under it, it had but a partial effect, and never completely discharged the defendant from his debts.

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But Lord ELLENBOROUGH C.J. said that there was a clear distinction between this case and *Norton v. Shakespeare*, where the composition was limited to one particular description of creditors only, and did not extend to creditors of every description. Here the defendant as far as in him lies, has compounded with all his creditors of whatever description, for he has propounded a general and equal satisfaction to them all, and therefore it is complete as to them. The case cited refers to this very distinction.

Per Curiam,

Rule refused.

The KING *against* THOMAS WILDEY.

Tuesday,
Feb. 9th.

THE defendant was indicted at the quarter sessions for the county of *Somerset*, for a larceny, in the usual form. To which indictment he pleaded as follows, "that at this same general quarter sessions of the peace of our said lord the king now holden at the time and place aforesaid, before the aforesaid justices of our said lord the king, he the said *Thomas* was in due manner of law acquitted of and from the very same identical felony and offence in the said indictment mentioned, as by the record of the said acquittal in the said court here will fully appear; and this he is ready to verify, wherefore he prays judgment, and that he may be dismissed and

Plea of autre-foit acquit, which does not state the record of acquittal, is bad. On writ of error brought on a judgment of conviction for felony at the quarter sessions, this Court will only look to the record of conviction, although the justices return also the record of a former acquittal.

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discharged of and from the premises in the said indictment mentioned," &c. To this plea there was the following replication, viz. "that there is no such record in the said court here of the said acquittal in due manner of law of the said *Thomas* of and from the very same identical felony and offence in the said indictment mentioned as by the said *Thomas* is in his said plea in that behalf above alledged." Demurrer and joinder; upon which the justices gave judgment of respondeas ouster, and thereupon the defendant pleaded not guilty, and at the same sessions a verdict of guilty was found, and judgment of transportation for 7 years awarded against him. Afterwards in *Michaelmas* term last the defendant brought a writ of error on this judgment, to which the justices returned as well the record of acquittal of the defendant as the record of conviction above stated, and the defendant assigned the following errors, "that the replication was argumentative in this, to wit, that it denied the existence of the record of acquittal of the same felony and offence mentioned in the indictment, but did not alledge that there was any other felony or offence ever committed or charged or supposed to have been committed by the said *Thomas* than that mentioned in the indictment, and to which the said acquittal related; and also, in as much as the replication was double and multifarious, and required several different trials (that is to say) by the record as to the existence of the record, by the Court as to the legality of the acquittal, and by the country as to the identity of the offence mentioned in the replication; and also in as much as there was no conclusion to the replication, as there ought to be, pointing out the mode of trial by giving a day for the inspection and production of the said record, or averring the matters contained

in

"In the replication, or praying that the same might be enquired of by the country; and lastly, that by the record and proceedings aforesaid, it appeared that the said *Thomas Wildey* was compelled to answer over, and had been convicted of the premises mentioned in the indictment, whereas by the law of the land the said *Thomas Wildey* ought to have been dismissed and discharged of and from the premises mentioned in the indictment."

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This case came on upon a former day in this term, when *E. Larves* for the defendant below, adverting to the return made by the justices, endeavoured to shew that by coupling the two records together it was apparent that the defendant had already been acquitted of the same offence of which he was afterwards convicted, and although this was not specially assigned as error, yet the Court would take notice of it under the general assignment that the defendant ought to have been discharged from the said indictment. In *Bishop's* case (a) there was a variance between the writ and declaration, and after error brought, the writ was removed by certiorari into this court, and the judgment was reversed, although the variance was not assigned for error. [*Bayley* J. There the Court referred only to the record in that suit.] In *Sir John Heydon's* case (b) a record is cited in which the judgment was reversed for errors not assigned. [The Court here interposed, saying that they could look only to that return which was made according to the exigency of the writ, and that the record of acquittal formed no part of such return.] He then insisted upon the several

(a) 5 Rep. 37, b.

(b) 11 Rep. 8, a.

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errors assigned, and principally that the replication was bad for duplicity, putting in issue the whole plea which, according to 2 *Hale's P. C.* 240., consisted partly of matter of record, and partly of matter of fact; 2dly, that the replication did not contain any conclusion referring either to the Court or the country, nor prayer of judgment which were essential; and upon these points he cited *Pendred v. Chambers* (a), *Pitt v. Knight* (b), and *Rex v. Shakespeare* (c).

Abbott contra, answered to these objections, that although there was more prolixity in the replication than usual, yet taking it with reference to the defendant's plea, it amounted to a plea of nul tiel record, it pursued the allegation in the plea, and denied the existence of any such record; and he referred to *Sanford v. Rogers* (d), to shew that it was not necessary there should be a formal conclusion, or that a day should be given for producing the record. He then contended that the plea was bad, being informal, and not agreeable to the usual form of pleading, nor according to the rules prescribed by Lord *Hale*, as necessary to be observed in such plea. It is laid down by Lord *Hale* (e), that the plea of autrefois acquit is a special plea, and that the prisoner must plead the record in certain, and not expect until nul tiel record be pleaded, for it is part of the prisoner's plea, and the means are also stated whereby he may possess himself of the record. Conformably to these rules a form of pleading is given in *Vidian* (f), and in *Vaux's case* (g),

(a) *Cro. Eliz.* 256.(b) 1 *Lev.* 222. 1 *Saund.* 97.(c) 10 *East*, 83.(d) 2 *Wilf.* 113.(e) 2 *Hale's P. C. ch.* 31.(f) *Vidian's Entries*, 207.(g) 4 *Rep.* 44.

where the reason is apparent for requiring the record to be set out. The only precedent in support of the present form is one in *Rastal* (a), which appears to be rather a short note of the proceedings than an accurate statement of what is required in such plea, for it does not even vouch the record.

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E. Lawes in reply. Admitting the precedent in *Rastal* to be defective, yet that defect has been supplied here by the addition of "prout patet per recordum," and if this plea contains every thing essential, it is no objection that it is concise. In civil proceedings it is always usual to plead a judgment recovered without setting it out. [Lord *Ellenborough* C. J. A taliter processum est may be generally good in civil and yet not in criminal cases, where it is the established mode of pleading to set out the whole record for the reasons given in *Vaux's* case. Is there any authority for such a concise form of pleading in criminal cases?] The prosecutor might have cravedoyer. Lord *Hale* says (b), if a record be pleaded in bar in the same court, the other party shall haveoyer of the record. Here the defendant has vouched the record, and therefore the prosecutor might have cravedoyer and demurred if the record was defective. The precedent in *Rastal* is copied into *Burn's Justice*, and has been used as a common form of pleading. *Staunford* (c) says it is a good plea to an indictment for felony to say that he was at another time arraigned before such justices, &c. and acquitted, and to vouch the record; and such plea shall be a good bar.

(a) *Rastal's Entries*, 385., Ed. 1670, under tit. Gaol Delivery, pl. 4.

(b) 2 *Hale's P. C.* 241.

(c) *Staunf. P. C.* 105.

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The Court took time to consider, and on this day judgment was delivered by

LORD ELLENBOROUGH C. J. Since this case was argued I have looked attentively into *Rastal*; and I find the precedent there stated is as full of faults as it can be. Indeed I can hardly conceive any thing more faulty; it is even worse than the plea that has been the subject of our consideration; which however is perfectly vicious for want of setting out the record, to shew that the prisoner was legitimo modo acquietatus, which appears to be necessary from the reasons given for the judgment in *Vaux's* case. In that case *Vaux* was indicted for poisoning one *Ridley*, and in discharge of that indictment he pleaded a plea of autrefois acquit, and set forth the former indictment and record in certain; and because the indictment was insufficient, and therefore the life of the party was never in jeopardy, for this reason he was held not legitimo modo acquietatus, and so the plea not a bar to a second indictment for the same offence. After this decision reported by Lord *Coke*, adopted and referred to by Lord *Hale*, who states pregnant reasons for its adoption (*a*), can we say that this is a good plea, in which there is no indictment set out, nor is it pleaded that the defendant was acquitted by verdict, nor that he had judgment quod eat sine die, which Lord *Hale* says is necessary to be pleaded (*b*), and upon the face of which it does not appear but that the defendant was pardoned? The precedent in *Rastal* is therefore one of the most vicious precedents that I ever contemplated; it merely states that prædictus *W.* ad barram

(*a*) 2 *Hale's P. C.* 248.

(*b*) *Ib.* 243.

ductus et allocutus qualiter se velit de feloniâ prædictâ acquietare, dicit quod ipse alias scilicet, &c. acquietatus fuit, unde petit judicium, &c. It does not even conclude with a voucher of the record, as the precedents uniformly require, and Lord *Hale* deems to be essential (a); but the conclusion is quia testatum est per præfatos Just^s. quod præd. *W.* acquietatus fuit, which might have been by verdict still subsisting in parol. I cannot conceive how such a form of pleading could ever have been considered as fit to be adopted. And yet this precedent is set against the precedents in *Vidian*, in *Vaux's* and *Vandercomb's* case (b), all of which I have examined. I had also a curiosity to know on what authority the precedents in *Rastal* were founded; and upon looking at his preface I find the author is anxious to discharge himself from all responsibility respecting that part of his work. He says, "Understand this, good reader, that none of the declarations, pleadings, entries, and precedents that be in Latin in this book be of my making or compiling." He then points at the sources from whence they were derived, viz. four books: first, the old entries; the second, a book of precedents by Mr. Edward Stubbis; the third, precedents by John Lucas; the fourth, a book of precedents, which, he says, "was my grandfather's, Sir John Moore, some time one of the justices of the King's Bench, but not of his collection." The only merit which he takes to himself, which is undoubtedly not an inconsiderable one, is in the arrangement of them and the index; but he expressly discharges himself from every other responsibility; assigning as a reason for so doing,

(a) 2 *Hale's P. C.* 242.

(b) 2 *Leach's Crown Cas.* 823.

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in the concluding part of his preface, that he had been absent from the kingdom, “and lacking conference with learned men.” This may be considered as a sufficient excuse for many errors; and, among others, for the insertion of that vicious precedent, on the sole authority of which we are desired to overturn the numerous authorities laid down by Lord *Coke* and Lord *Hale*, two of the most eminent authors and judges that have ever adorned *Westminster-hall*. It is unnecessary to say any thing upon the defects of the replication, because the question is taken up at an earlier stage of the proceeding, viz. the plea, and upon that we are of opinion, without farther reference to the abundant authorities which may be found collected in Lord *Hale*, that the plea is bad; and consequently that the judgment of the Court below must be

Affirmed.

Tuesday,
Feb. 9th.

The KING *against* The Justices of CUMBERLAND.

Where the weavers presented a petition to the justices at sessions, praying them to limit a rate of wages according to the provisions of stat. 5 *Eliz.* c. 4. § 15., and 1 *Jac.* 1. c. 6. § 3., and the

justices heard the petition and counsel in support of it, and after making inquiry and examining witnesses upon the subject, determined that they could not make any rate more beneficial to the weavers: this Court refused a mandamus to the justices to hear and determine, although they did not examine the witnesses tendered by the petitioners, nor any witnesses upon oath, or in open court.

A Rule was obtained in *Trinity* term, which was afterwards enlarged in the last until this present term, for a mandamus to the justices of *Cumberland*, “commanding them, together with the sheriff of the same county, if conveniently he may, pursuant to the statute in such case made and provided, to hear and determine, upon the application of certain weavers of the said

county,

county, for them the said keepers of the peace and justices to limit, rate, and appoint the wages of weavers in the said county." The affidavits on which the rule was granted stated that at the general quarter sessions in *April* last, within six weeks of the feast of *Easter*, a petition was presented by the deponents and others, "operative weavers of *Carlisle* and its vicinity," disclosing the reduced state of their wages, and their total inadequacy to procure for them and their families the common necessities of life, and praying the justices to grant them relief by putting in force the acts of parliament relative to the rating of mechanics' wages according to the rate of provisions, viz. the 5 *Eliz. c. 4. §. 15.* and the 1 *Jac. 1. c. 6. §. 3.*, and affixing such prices to the different fabrics of cotton cloth as would enable the workers thereof to live by their labour. That evidence was offered to the justices in support of the allegations contained in the said petition, but that without hearing such evidence, or making any inquiry, or calling unto them such grave and discreet persons as by law is required, the justices wholly refused to grant the prayer of the said petition, and to consider of fixing a rate of wages, and to hear what might be alleged thereon, or proceed in the matter as by law they ought to do, and that no rate of wages of the weavers within the county has been made at any time before or since the said sessions. The rule was opposed by an affidavit of the chairman and several of the justices who attended at those sessions, which stated that the petition upon being presented was attended to by them, and counsel heard in support of it on the same day, and that they took further time until the next day to consider of the subject, and after making every inquiry in their power into the relative situation of masters

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and weavers, and sending for and examining all or the most part of the principal manufacturers in the city of *Carlisle*, as to the wages allowed to weavers, and the profits arising to themselves, and comparing the present wages of the weavers and profits of the manufacturers with the wages and profits of former years, and after maturely and attentively considering the subject to the best of their judgment and ability, they were of opinion that they could not in justice make any rate of wages which would be more beneficial, or more than the wages then allowed to the weavers, and therefore made no order upon the said petition.

Park and *Scarlett*, who now shewed cause against the rule, admitted that the Court had granted a similar rule in favour of the journeymen millers in *Rex v. The Justices of Kent (a)*, but denied that it was under similar circumstances with the present. In that case the justices refused to entertain the subject of the petition under a supposition that they had no jurisdiction to hear it; and this Court in granting the rule only decided that the stat. 1 Jac. I. c. 6. was a continuing law: still the question remains whether the powers given to the justices by that statute are to be called into action at the instance of individuals, or are left to be exercised at their own discretion. The act requires that they shall assemble themselves together, and then gives them authority to limit such wages as they shall think meet by their discretion to be rated: it is clear therefore that it meant to leave the discretion entirely with the justices, whether or not to put their powers into motion. But 2dly, supposing

(a) 15 East, 395.

they may be compelled upon the prayer of others, here it appears that the justices acted upon the petition; for they heard it, and fully inquired into the subject, and decided that they could not make any rate more beneficial to the weavers than the then existing rate of wages. They have therefore done every thing which the petitioners required, unless indeed it is to be contended that they are bound to make a rate without exercising any discretion at all, which can hardly be contended either upon the words or the intention of the act.

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Topping and Brougham contra. If the justices are required by statute to do an act, this Court in the exercise of its jurisdiction will see that they do it properly, and will enforce the doing it by mandamus; and for that purpose, even if it should appear to be the true construction of the statute that the justices are to act of themselves in the first instance and not upon the petition of others, will strike out that part of the rule which requires them to proceed *on the application of the weavers* rather than permit the statute to remain a dead letter. But there is no occasion for that; because it is an acknowledged rule of construction, that where a statute gives a remedy, it also gives a means of attaining that remedy, and although the party on whose behalf it is given be not named in the statute, yet he may enforce it. Therefore in *Rex v. The Justices of Westmorland (a)*, a mandamus was granted to appoint overseers for a hamlet, upon an affidavit that there were poor belonging to it; and yet the 13 & 14 Car. 2. c. 12. does not empower any individual to enforce the appointment; and in *Rex*

(a) 1 Wils. 138.

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v. *The Justices of Kent* the mandamus was granted in the same form as now prayed. As to the objection that the justices have heard and decided upon this application, it is stated that they would not hear the evidence offered in support of the petition; and although they state, on the other hand, that they examined all the principal manufacturers, yet those were interested witnesses, and it does not appear that even these witnesses were examined upon oath, or in the presence of the parties making the application. Besides, the 5 *Eliz. c. 4. s. 15, 16.* is imperative upon the justices either to make a new rate, or to continue the old one, notwithstanding the equivocal expressions “shall assemble themselves,” and “shall have authority,” used in the former part of *s. 15.* Here the justices have done neither.

LORD ELLENBOROUGH C. J. We are now occupied in the consideration of a rule to shew cause, which is in these terms, viz., why a mandamus should not issue to the justices of *Cumberland*, commanding them, in pursuance of the statute, to hear and determine upon the application of certain weavers, and to limit, rate, and appoint the wages of weavers in that county? Such is the description of this application. Two objections have been made to it; the 1st, that we have no authority in this instance, to direct them to hear and determine, which is contrary to what we decided in *The King v. The Justices of Kent*, whether rightly or not I will not now pause to enquire, but will assume that we did right, and that in this respect the application ought to be entertained. But there is another objection of more weight, viz., that the justices have heard and determined. The stress of the argument on the other side is this, that they
are

are bound to hear and determine according to a judicial course of proceeding, by the examination of witnesses upon oath, and in a public court. Now, on that subject we must refer to the statute, and if we find that however clearly it imposes the duty, it leaves the mode of exercising that duty at large, and to be pursued according to the discretion of the justices, we cannot impose on them the terms on which they are to exercise it, or the forms of proceeding which may be necessary in other cases. Now, the statute says, that "the justices shall assemble themselves together, and calling unto them such discreet persons as they shall think meet," so far it is clearly directory, "and conferring together respecting the plenty or scarcity of the time and other circumstances necessarily to be considered," without saying examining such persons upon oath, "shall have authority," &c. That is the whole which the act prescribes as to the mode in which the justices are to exercise their function. Whether that function is to be called forth by the application of others, or to be exercised on their own motion, or whether it is discretionary in them to make a rate or not to make it, are questions not now before the Court; because this is not an application calling on them merely to determine, but to hear and determine in a certain way, and the answer is that they have heard and determined in that way. If they have determined wrong on that occasion, still if they have heard and determined, we should not grant the application in this form, which would be to hear again. I do not mean to say that if they are to hear and determine, the Court will not enforce it; and therefore if their hearing was elusory, I agree that, on the authority of *The King v. The Justices of Kent*, (subject only to any revision which that case

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may undergo) that a mandamus ought to be granted. But what does the affidavit state upon this part of the case? They did hear the petition, and they also heard counsel in support of it; which is more than I should have expected them to do; for in a matter which was not of judicial inquiry, it was not necessary, and would of course lead to subjects of declamation and perhaps inflammation, and I should therefore have dissuaded them from it. But they not only heard, they inquired also into the relative situation of the masters and weavers, and into the present rate of wages allowed to weavers, and profits arising to the manufacturers as compared with those of former years. What am I to infer from all this, but that they took into consideration the state of their wages, in respect to their inadequacy to procure for them the necessaries of life according to the rate of provisions. It is said they inquired of persons concerned in the trade and interested; but that is incident to all inquiries of this nature, where those who are concerned are the persons best able to give the necessary information. I will not entertain so harsh a presumption, as to suppose that the principal manufacturers would be inclined to deny to their fellow-labourers, what was a fair allowance under the existing circumstances. But besides hearing and inquiring, the justices determined also; for they were of opinion that they could not make any more beneficial rate. I admit that that will not satisfy the act, if they are bound to make a rate; but that is not the question arising upon this application; neither do I pronounce any opinion upon it, but desire to be understood as deciding only on this application, which is to compel the justices to *hear* and determine. The inquiry to be made by them is not a judicial inquiry; if it were so, every
weaver

weaver might come to the sessions with his counsel and witnesses, and require to be heard in open court; but the act has left it very general, and not required the application to be proceeded on according to judicial forms. Then if the justices have duly heard, it would be actum agere to compel them to hear again.

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LE BLANC J. This is an application for a rule to set in motion powers given to the justices, the exercise of which, according to the general sense of mankind in modern times, it may be fairly said would be most injurious to both masters and workmen; however proper they might have been at the time when the act passed. But notwithstanding this, the Court will enforce those powers if they see that the justices have refused to do that which the act prescribes. The rule calls on them upon the application of certain weavers to hear and determine: not to make a rate. The question is, have they heard and determined on such application: if they have, the Court will not grant a mandamus directing them to do that which they have done already. It is objected that they have not heard and determined in the same manner as upon appeal touching a settlement or on indictment found; but I cannot say that any thing in the act shews that the powers of the justices must be exercised in the same way as if they were proceeding between litigating parties, viz. upon the oath of witnesses and in open court. But they were desired by the petitioners to consider of the inadequacy of their wages, to hear evidence thereon, and to determine on the fixing a rate of wages more adequate: and they did so, and have returned to us that after making inquiries into the state of the trade and the wages allowed to weavers, they were of opinion they could not

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in justice make any rate more beneficial to the weavers. To be sure if they were bound at all events to fix a rate of wages, such a return would be insufficient. The act however says they shall have authority, and therefore perhaps if the state of the trade would not permit a higher rate, it would be a ground for their not fixing one; but that is not the question now before us. The act requires that they shall assemble themselves together and call to them such discreet persons as they shall think meet, and confer together; and they have stated to us upon oath that they have so done. I therefore think the rule ought to be discharged.

BAYLEY J. I think the justices have heard and determined as far as they were obliged within the meaning of the act. There is nothing in it to compel them to hear and determine openly; and with respect to fixing a rate, although it is not necessary to go into that question, I cannot but think that the fair construction of the act is to give them a discretion on that subject, to fix a rate or not according as in their judgment it shall seem expedient. That appears to have been the impression of the Court in *Rex v. The Justices of Kent*. The act uses compulsory words where it directs the justices to assemble themselves together, for it says, “*shall* assemble themselves,” &c.; but when it directs them to limit the wages, it only says, “shall have *authority* to limit,” &c., which is a marked difference in the terms used by the legislature.

Rule discharged.

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HOLT *against* FRANK and Another (a).Wednesday,
Feb. 10th.

THE plaintiff brought a joint action against *Stephenson* and *Burn*; and the two defendants in the present action became bail above, for *Stephenson* alone, the recognizance of bail being drawn up by mistake in a cause of "*Stephenson* at the suit of *Holt*," instead of "*Stephenson*, sued jointly with *Burn*, at the suit of *Holt*." The plaintiff obtained judgment in the original action, and after having fixed the bail, sued out two writs of *sci. fa.* against the defendants as bail of *Stephenson*, and having procured each *sci. fa.* to be returned nihil, signed judgment against them and took out execution. Under these circumstances,

If in a joint action against two the recognizance of bail be drawn up by mistake in an action against one only, and the plaintiff after two writs of *sci. fa.* against the bail, and nihil returned to them, sign judgment against the bail and take out execution; the Court will set aside the judgment and execution for irregularity.

Tindal obtained a rule nisi for setting aside this judgment and the execution, upon the ground that if the defendants had been served with the *sci. fa.* they might have appeared, and pleaded nul tiel record as a bar to the action; and that wherever they are prevented from pleading by the plaintiff's procuring two nihils to be returned, they may avail themselves of their defence either on an *auditâ querelâ*, *Sampson v. Collingwood* (b), or the Court will relieve them by motion, *Ludlow v. Leonard* (c). 2dly, That the defendants were really injured by the form in which the recognizance was drawn up, as they had lost the means of rendering *Stephenson*, there being no such action as that of *Stephenson* at the suit of *Holt*.

(a) We were favoured with this note by Mr. *Tindal*.

(b) 1 *Salk.* 262.

(c) 2 *Ld. Raym.* 1295.

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And 3dly, that it was the plaintiff's duty to have seen that the recognizance was properly drawn up, as the plaintiff's attorney charges a fee for searching the book at the Judge's chambers to see if the bail-piece has been duly entered, which fee he is allowed in costs.

● *Littledale* now shewed cause, and contended that the drawing up the recognizance was not the act of the plaintiff in the action, but of the defendant, or the bail, and therefore the plaintiff ought not to be prejudiced by the defective mode of drawing it up. And he produced an affidavit, by which it appeared that the plaintiff had sued out a joint writ against both the defendants in the original action, but that *Stephenson* had been arrested in the county palatine of *Durham* under process of the Court of the county palatine, and *Burn* in *Yorkshire*, under process of this Court.

The Court said, that that circumstance sufficiently accounted for the mistake; but that the proceedings were clearly irregular, and made the rule absolute.

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BELL and Others against JANSON.

Wednesday,
Feb. 10th.

ASSUMPSIT on a policy of assurance on goods. The plaintiffs, as the surviving partners of *William Bell*, declared that heretofore in the lifetime of the said *William*, to wit, on the 27th of *March* 1810, at *London*, &c. they caused to be effected a certain writing or policy of assurance, purporting thereby, and containing therein, that the said *William Bell*, *John Bell*, *Reuben Gaunt*, and *Walter*, by the name and description of *William and John Bell and Co.* (the same then and there being the usual style and firm of dealing of the persons residing in *Great Britain*, who received the order for and effected the said writing or policy of assurance) as well in their own names, &c. did make assurance, &c. at and from *Virginia* to her port or ports of discharge in the United Kingdom, or any port or ports in the *Baltic*, on goods on board the ship called, *The Ann*, or *ships*, or by whatsoever other name or names the ship was or should be named. The declaration also alleged that afterwards, to wit, on the 30th *March* 1810, at *London*, &c. by a certain memorandum then and there written upon the margin of the said policy, the interest insured thereby was declared to be on board the *Herald*, Capt. *Barrow*. It then averred the interest in *John Bell*, and a loss by capture. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Michaelmas* term, the policy was produced; which was dated and subscribed on behalf of the defendant on the 27th *March* 1810; and contained the memorandum of the 30th as described in the declaration, signed also by the defendant. It appeared that the memorandum had

Where the plaintiffs declared on a policy of assurance, and averred that they were the persons residing in *Great Britain* who received the order for and effected the insurance; this was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected, directing them to make assurance; although the policy was originally on goods on board the *Ann*, or *ships*, or by whatsoever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, signed by the defendant, declaring the interest to be on board the *Herald*, the ship mentioned in the letter.

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been procured by the plaintiffs on the 30th, in consequence of a letter received by them on that day from *John Bell* in *Virginia*, dated the 26th *January* preceding; which apprised them of his having purchased the ship *Herald*, and that he should load her with a cargo to their address, and requested them on the receipt of that letter to make assurance on the ship and cargo against all risks, in the same manner as done in late similar cases, (specifying the particulars of the insurance). The plaintiffs relied on this letter as proving their allegation "that they were the persons who received the order for effecting the assurance;" which assurance, although effected on the 27th, they contended was not completed until the memorandum was added, which was after the receipt of the letter. Lord *Ellenborough* C. J. was of opinion that the policy must be considered as having been completely effected on the 27th, the memorandum being only in the nature of a declaration of the interest previously insured; and that as the plaintiffs had alleged in their declaration that they were within one of the descriptions of persons mentioned in the stat. 28 *Geo.* 3. c. 56. they were bound to support that allegation by proving a previous order. The plaintiffs were thereupon nonsuited.

On a former day in this term *Park* obtained a rule nisi for setting aside the nonsuit; on the ground, 1st, that the averment that the plaintiffs were the persons who received the order for and effected the policy was an immaterial averment, and need not be proved: and secondly, admitting it to be material, that it was sufficiently proved by the letter of the 30th of *March*, which if not a previous order was equivalent to one, being an adoption of the insurance already effected on the 27th, and so would

relate back to the date of that insurance : and in support of this he referred to *Wolff v. Horncastle* (a), and *Stirling v. Vaughan* (b).

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The Solicitor-General, Holroyd, and Scarlett now shewed cause, and insisted on the objection allowed by the Chief Justice at the trial, and the importance of maintaining a certain rule ; and they added, that it had never been held that the recognition of an act done was tantamount to an order for doing it, although it might be an adoption of the act itself.

Park, Marryat, and J. Warren, contra, maintained that what was laid down by *Buller J.* in *Wolff v. Horncastle* (c) was a strong authority on the second point, because it clearly shewed that a subsequent approval by the principal is enough to constitute the agent who effected the insurance, the person who received the order for effecting it. [Lord *Ellenborough C. J.* That is a part of Mr. *J. Buller's* judgment to which I should hesitate to assent, because when the statute requires the names of a particular description of persons to be inserted in the policy, I doubt if the maxim that *omnis ratihabitio retrotrahitur*, &c. applies.] In *Lucena v. Craufurd* (d) the interest being averred in the king, the Chief Justice directed the jury that if any of his majesty's subjects effect an instrument for his benefit, his majesty may legally adopt and ratify the same ; and the same doctrine was laid down in *Stirling v. Vaughan*. The act was intended only to prevent policies being effected in blank, but here the order was in existence

(a) 1 *Bos. & Pul.* 316.(b) 11 *East.* 623.(c) 1 *Bos. & Pul.* 323.(d) 1 *Taunt.* 335.

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prior to the date of the policy, though it did not come to hand until a few days after.

The Court, however, were clearly of opinion that the nonsuit was right. As to the first ground, that perhaps the declaration might have been good without the averment in question, or have been cured by verdict, but it did not follow that because it was an unnecessary, it was therefore an immaterial averment: that it was material, inasmuch as the plaintiffs had taken upon themselves to allege they were within one particular description of persons mentioned in the act; and although without such averment, the Judge at the trial might have been bound only to see that they answered to any one of the descriptions specified in the act, yet now the plaintiffs had limited themselves to that precise description, and consequently were bound to prove it. As to the second ground, that the letter of the 30th could not be considered even as an adoption of the insurance; for at the time when it was written, the party was not aware of the insurance having been effected; and a person could not be said to adopt a thing of which he knew nothing at the time.

Lord ELLENBOROUGH C. J. added, that he was sorry these apices juris were relied upon, and that the Court, who were bound to pronounce upon them, had no pleasure in disappointing the expectations of parties suing, but that the certainty of the law was of infinitely more importance than any consideration of individual inconvenience.

It being suggested, however, that the plaintiffs had other evidence, the Court made the

• Rule absolute on payment of costs.

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ASSUMPSIT for money had and received, tried at the *London* sittings after *Michaelmas* term 1811, before Lord *Ellenborough* C. J. when the jury found a verdict for the plaintiff, damages 10*l.*, subject to the opinion of the Court on the following case:

That in the cathedral church of *Exeter* there are prebendaries or canons who are nominated and collated by the Lord Bishop of *Exeter* for the time being. That there are nine canons residentiary who are elected by the chapter of the said church out of the prebendaries or canons aforesaid, but such canons residentiary retain their former prebend or canonry. That the chapter of the said church is composed of the dean, who is always one of the canons residentiary, and of the other canons residentiary so elected as aforesaid. That on the vacancy of the office of dean, and notification thereof to the bishop, and on the issuing of letters patent by the crown, granting the deanery and requiring the chapter and canons to elect and admit the person nominated to the office of dean, the bishop and chapter have been used to proceed in the following manner: If the person so nominated to the deanery was not at the time of his nomination a canon residentiary, the bishop has by an instrument under his

A statute made in 1663 by the Bishop, with the consent of the Chapter, of *Exeter*, conferring upon every canon residentiary who should cease to be such by promotion to a higher degree and dignity in the Church of England (unless it be by voluntary resignation, &c.) the right of receiving to his own use the whole profits and advantages of the canonry for the following year, supposing such a statute to be valid, is at all events contrary to the policy of the ecclesiastical establishment, and to be construed strictly: therefore, where the defendant, who was Dean and Canon of that Chapter, resigned the same in order to obtain promotion

to another deanery, to which he was shortly afterwards promoted: it was held that he was not within the statute, not having ceased to be a member of the former church by promotion to the latter, but having ceased to be so before his promotion: and besides, his resignation having been voluntary, he was expressly excluded by the terms of the exception; and a promotion from one deanery to another seems not a promotion to a higher degree. The admission of the plaintiff as Canon into plenum jus, although not made until a year after his first admission, related back to the time when his title to the profits accrued, so as to enable him to maintain an action for them.

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episcopal seal collated the person so nominated, to the office of prebend holden by the late dean, and the chapter has afterwards elected such person to the office of canon residentiary holden likewise by the late dean, who has been thereupon installed, and afterwards the chapter has elected such person into the office of dean. That if the person nominated to the deanery was at the time of his nomination a canon residentiary, then the prebend vacated by the late dean has been otherwise filled up. That the dean and other canons residentiary share equally the profits of the common possessions of the dean and chapter, but there are other profits and possessions peculiarly belonging to the deanery. That the Bishop of *Exeter* for the time being has been accustomed, with the consent of the dean and chapter, to make statutes respecting (amongst other things) the common possessions of the dean and chapter. That in or about the year 1191, *Henry Marshall*, then Lord Bishop of *Exeter*, with the consent of the chapter, made the following statute: “ Omnibus ad
 “ quos præsens scriptum pervenerit, Henricus Dei gratiâ
 “ Exon episcopus et capitulum beati Petri Exon æternam
 “ in Domino salutem : cum semper pium sit et salubre
 “ humanæ conditionis imperfectioni et impotentiae studio
 “ pietatis subvenire, tum maxime preciosæ devotionis
 “ meritum piè completur et laudabiliter, cum juste de-
 “ centium voluntati, utilitati etiam et necessitati, prudenti
 “ providetur industriâ; inde est quod ad universitatis
 “ vestræ notitiam volumus pervenire, quod nos, communi
 “ concilio vestro et unanimo assensu, intuitu pietatis de-
 “ crevimus de communiâ canonicorum ecclesiæ nostræ
 “ decedentium, talem dispensationem deinceps inviolabi-
 “ liter observari; scilicet, quod quilibet canonicus eccle-
 “ siæ nostræ in extremis agens ad supplementum testa-
 “ menti

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“ menti sui communiz proximi anni post decessum ejus
 “ liberam in omnibus habeat dispositionem, ita quod eam
 “ quibus et in quos usus pios voluerit integre poterit
 “ assignare.” That in the year 1553 *John Voysey*, then
 Lord Bishop of *Exeter*, with the like consent made the
 following statute: “ Nihilominus tribuitur canonico
 “ residenti defuncto ad supplementum testamenti sui
 “ communia proximi anni sequentis post ejus decessum,
 “ ita quod eam communiam quibus et ad quos usus pios
 “ disponere voluerit, integre possit libere assignare.
 “ Præterea antiquum illud ecclesiæ statutum, et per 353
 “ annos assiduâ consuetudine inviolabiliter observatum,
 “ concedit canonico residenti qui compleverit primum
 “ annum residentiz, juxta formam statutorum, ad sup-
 “ plementum testamenti sui communiam ecclesiæ præ-
 “ dictæ proximi anni sequentis post mortem.” That in
 July 1662 *Seth Ward*, one of the canons residentiary of
 the said church, was promoted to the bishoprick of *Exeter*,
 and was succeeded in his said canonry by *John Snell*.
 That on the 27th of *March* 1663 the said *Seth Ward*,
 then being Bishop of *Exeter*, with the consent of the
 chapter, made the following statute: “ Ut quilibet ex
 “ novem canonicis residentiariis cui contigerit *ab hac*
 “ *ecclesiâ amoveri*, sive per mortem naturalem, sive per
 “ *promotionem ad altiorem gradum et dignitatem in ec-*
 “ *clesiâ Anglicanâ*, (*nisi sit per voluntariam cessionem, aut*
 “ *resignationem*, aut deprivationem in foro civili aut
 “ ecclesiastico) percipiet vel executoribus aut assignatis
 “ suis in quos velit usus legare et assignare possit, præter
 “ proventum illius termini in quo moritur vel amovetur,
 “ integram communiam, unius anni sequentis, id est,
 “ quotidianas distributiones in fine cujusque termini,
 “ necnon fines terrarum, maneriorum, firmarum, garba-
 “ rum,

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“ rum, domorum, et quas vocatis excreſcentias in fine
 “ anni dividendas, oneribus debitis et conſuetis deductis,
 “ pilulis beneficiorum, et pecuniis pro majoribus refec-
 “ tionibus, exceptis et reſervatis.” “ Ut quilibet cano-
 “ nicus ad reſidentiam admittendus, ſi nullam domum
 “ ſuæ dignitati aut officio propriam, nec unam ex ſeptem
 “ domibus canonicalibus, (prout nunc eccleſiæ ſtatus
 “ eſt) poſſideat, aliam domum convenientem intra clau-
 “ ſum ejusdem eccleſiæ ſibi procurabit, in quâ primum
 “ annum reſidentię ſuæ ſervare et hoſpitalitatem tenere
 “ commode poſſit, niſi ex cauſâ rationabili per decanum
 “ et capitulum (velut in præſenti neceſſitate) indulſum
 “ fuerit. Neque ullus canonicorum ad reſidentiam ad-
 “ miſſus percipiet quotidianas diſtributiones, vel alios
 “ eccleſiæ proventus, præter ſex marcas ſterlingorum
 “ nomine præbendæ ſuæ, prius quam primum annum
 “ reſidentię ſuæ compleverit.” “ Quilibet *canonicus* qui
 “ complevit primum annum reſidentię ſuæ, et proteſta-
 “ tus eſt in capitulo ſe juſte compleviſſe, protenus ad-
 “ mittetur ad *plenum jus*, et percipiet quotidianas diſtri-
 “ butiones ſibi ob reſidentiam debitas, nec non fines pro
 “ firmis, garbis, aut domibus elocandis, majores refec-
 “ tiones, et pilulam beneficiorum, unà cum privilegio, et
 “ beneficio anni poſt mortem aut promotionem ut ſupra
 “ aſſignato, reſervatis tantum et exceptis excreſcentiis illius
 “ anni quæ debentur executoribus aut aſſignatis illius ca-
 “ nonici in cujus locum admiſſus fuerit. In cujus rei teſti-
 “ monium, &c. Dat. Exon. 27 die Martii, A. D. 1663.”

The ſeveral ſtatutes before mentioned ſtill remain in force.
 The caſe then ſet out a liſt containing all the caſes of
 avoidance of the office of canon reſidentiary, being ſeven-
 teen in number, (otherwiſe than by death) from the year
 1607 to the year 1810, by which it appeared that except

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in four instances the predecessor received the profits of the annus sequens. That *Charles Talbot*, the person last named in the list, received the profits of the canonry for the year succeeding his resignation; that he was succeeded in the deanery of *Exeter* by the defendant, who had been a canon residentiary for some years. That in the month of *January* 1810 it was signified to the defendant, that his majesty would be pleased to promote him to the deanery of *Lincoln*, on condition however of his resigning his deanery, prebend, and place of canon residentiary of *Exeter*. That the defendant, in order to obtain such promotion, did on the 5th *February* 1810 resign his deanery or office and dignity of dean into the hands of his majesty, and his canonry or prebend into the hands of the bishop of *Exeter*, which being accepted, the defendant was shortly afterwards promoted to the deanery of *Lincoln*, and on the 10th of the same month of *February* the bishop of *Exeter* collated the plaintiff to the prebend or canonry then vacant by such resignation of the defendant. That on the 14th day of the same month of *February* his majesty by his letters patent of that date, gave and granted to the plaintiff the deanery of the said church, then vacant by the resignation of the defendant, to hold to him for life with all the rights, profits, and emoluments thereto belonging, and required the chapter and canons to admit him accordingly. That on the 24th of the same month the plaintiff was duly admitted and installed a prebendary. He was then elected, admitted, and installed a canon residentiary, (to wit,) "into the place void by the resignation of the defendant," and afterwards he was duly elected and has from thence hitherto been dean of the said church. That on the 8th of *February* 1811 the plaintiff having completed one year's residence, was on

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his application by an act of the chapter pronounced full residentiary in the said church, and capitularly admitted a full residentiary, with all the profits and emoluments belonging and appertaining to a full residentiary, to wit, a portion of *Stokerwood* balls, fortitions of benefices, the annus post mortem, with all other profits and commodities as the rest of the canons theretofore admitted to full residence have been accustomed to receive. That the defendant has received by the hands of the chapter clerk the sum of 10*l.*, being part of the profits of the said canonry, which accrued subsequently to such his resignation, and subsequently also to the plaintiff's election, admission, and installation aforesaid. That this action is brought by the plaintiff to recover the sum so received by the defendant as aforesaid. The question is, whether the plaintiff is entitled to recover: if the Court should be of that opinion, the verdict to stand; if not, a nonsuit to be entered. The resignation of the defendant, which was dated 5th of *February* 1810, and agreed to be referred to, was in its terms a voluntary resignation of the prebend or canonry and all its rights, &c. into the hands of the bishop.

This case was argued in last *Michaelmas* term by *Burrough* for the plaintiff, and *P. Williams* for the defendant; but the Court in giving judgment went so fully into the grounds of their decision, that it precludes the necessity of entering farther into that part of the case. There were several other points made in argument, to which it will be enough shortly to advert. For the plaintiff it was contended, 1st, that the statute of Bishop *Ward* was void, being contrary to the restraining statute 13 *Eliz. c. 10.*, which was passed against the impoverish-
 ing

ing of successors; and *Gibson's Codem*, 1 vol. 660. (note on that stat.) was cited, and also the case of *Magdalen College (a)*, where it was said that the act had been always construed beneficially to prevent all inventions and evasions. 2dly, That it was void at common law, inasmuch as the former canon, when he ceased to be such, was to be considered as a stranger to the church, and therefore the effect of the statute was to divert the possessions of the church out of the channel in which by the common law they ought to be distributed, viz. for the maintenance of religion and the members of that body in whom they are vested.

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For the defendant it was answered, that this statute was not within the 13 *Eliz. c. 10.*, which only went to restrain the alienation of church lands by ecclesiastical bodies, and not (as was the case here,) the mode of regulating the distribution of the common funds of any ecclesiastical body amongst the members of that body. As to its being void by the common law, several authorities to the contrary were cited, viz. *Viner's Abr.* tit. Custom, 169., that a custom need not be according to the common law. *Ib.* tit. Bye-laws, 306. *Danv. Abr.* tit. Bye-laws, B. 3. Tenants of a manor may make bye-laws to bind themselves. 2 *T. R.* 630. *Radcliffe v. Doyly*, that this Court will take notice of such a local statute; and the *Canons*, 1317. Do. 1603, which although not held to be binding as part of the common law, *Middleton v. Croft (b)*, are yet of great weight as they regard the clergy. And the case was likened to that of probationary fellowships or years of grace, which

(a) 11 *Rep.* 76.(b) *Str.* 1056.

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are well known in most of the colleges within our universities. If then the statute be not void in itself, it may be expounded by the usage which has prevailed with a very few exceptions, as appears from the list of avoidances. An objection was also taken that the plaintiff could not maintain the action in respect of the profits accruing before he was capitulariter admissus in plenum jus, which did not take place until after one year's residence: but to this it was answered that the plaintiff was admitted into plenum jus before the commencement of the action, and that such admission would relate back to the time when his title accrued.

LORD ELLENBOROUGH C. J. then said, that if this case could be considered as involving any question upon the validity of the statute, as it might affect a vast number of bodies, particularly collegiate bodies, where statutes respecting probationary fellowships existed, and all of which probably originated in the bodies themselves, and not in the founders of those bodies, it might become a question of great magnitude and requiring the most serious consideration. If it involved only a question as to the construction of this statute, which might be the case, still there was a sufficient degree of nicety in that question to make the Court pause before they decided. As to the objection made to the plaintiff's right to maintain the action, not having been admitted into plenum jus, his lordship said that the answer given to it seemed to be sufficient. On this day

LORD ELLENBOROUGH C. J. delivered the opinion of the Court. The question arises upon a statute of Bishop *Seth Ward*, made in 1663 with the consent of the chap-

ter of *Exeter*. The statute has been already stated. The object of this statute is to confer upon every canon who should cease to be such by natural death, or by promotion to a higher degree and dignity in the church of *England*, in the first case, that is, of death, the power of bequeathing or assigning for such uses as he should think proper; in the latter, that of promotion, &c., the right of receiving for his own use, the whole profits and advantages of the canonry for the following year. Being of opinion upon the construction of this statute of 1663, (as upon full consideration we are,) that the defendant's claim under it cannot be maintained, it is not absolutely necessary for us to decide on the validity of such statute: it may be sufficient to say that such statute appears to us subject to powerful objections. It may certainly be considered as made for the particular benefit of the then existing members of the chapter, who thereby acquired the contingent advantages of the year following the last of their incumbency in the cases specified; and to the prejudice of their successors, who would necessarily become members of the body subject to the burthens of the annus sequens in favour of their predecessors, without having had, as the makers of the statute had, the benefit of an original incumbency free from this charge; except indeed as far as respected the power of bequeathing, in case of the canon's death, given to the predecessor by the former statutes of Bishop *Marshall* and Bishop *Voysey*. The statute being made under these questionable circumstances, and contrary to the general policy and interests of the ecclesiastical establishment, as the same may be not only inferred by reason, but collected from the 28 *H. 8. c. 11. §. 2.* which reprobates and prohibits certain contrivances by which the incoming clerk had,

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over and above the first fruits due to the king, “ been
 “ constrained to lose all or most part of one year’s pro-
 “ fit of their benefices and promotions, and to serve the
 “ cure at their or their friends’ proper costs and charges,
 “ or utterly to forsake and give over their benefices and
 “ promotions, to their great loss and hindrance :” I say
 a statute made as this in 1663 was, and attended with
 these consequences, requires at any rate to be construed
 strictly and according to its very letter, and not favour-
 ably and beneficially for the interests of those who had
 ceased to be, and to the prejudice of those who became,
 the members of the body, to be affected by this private
 statute. Applying this rule of construction to the
 words in question, the claim on the part of the defend-
 ant will on examination be found not only to rest upon
 no words competent to sustain and include it, but to
 be excluded by express words competent to exclude it.
 The words under which this right must be claimed are
 these : “ cui contingat ab hac ecclesiâ amoveri per pro-
 “ motionem ad altiore gradum et dignitatem in eccle-
 “ siâ Anglicanâ.” Now has the defendant, who claims
 in this case, been in fact amoved from the chapter of
Exeter per promotionem ? So far from being amoved
 by promotion, he had in fact ceased to be a member of
 the church of *Exeter* before his promotion to the deanery
 of *Lincoln* took place, and his ceasing to be a member
 of the former church was made the very condition upon
 which his promotion to the deanery of the latter was
 afterwards to take place. So far was he from being
 literally amotus per promotionem, that he removed him-
 self, in order to become the object of a promotion, pro-
 mised to him only upon the condition of his antecedent
 self-removal or resignation. If indeed he had been re-

moved by the immediate effect and consequence of promotion, it would still be highly difficult to establish that the promotion in this case was a promotion *ad altiorum gradum*, &c. The promotion, in substance, is only from one deanery to another; offices of equal rank, degree, and dignity in the church; though one of them be more eligible in point of pecuniary emolument or other advantages than the other. The defendant resigned both his deanery and canonry of *Exeter* on the same day; the one to the king, the other to the bishop: which of them he resigned first does not appear; neither is it material, as he quitted each by an act of resignation, and in order to obtain the promotion to the deanery of *Lincoln*, to which it appears that he was shortly afterwards promoted. His ceasing to be dean and canon of the one church, and his becoming dean of the other, were not legally connected as cause and effect: if they had been so, the supposed cause, namely, the promotion in the church of *Lincoln*, would have necessarily preceded the supposed effect, viz. the removal from the church of *Exeter*: but the contrary was the case. In a word, a prior promotion at *Lincoln* was not the cause of a subsequent or contemporary vacancy at *Exeter*; but the expectation of a future promotion at *Lincoln* was the motive and inducement to a prior resignation at *Exeter*: and in that way only did the promotion at *Lincoln*, not actual but future, uncertain and resting in expectation alone, operate to produce the vacancy upon which the question arises. Thus much as to the words *amoveri per promotionem ad altiorum gradum*, &c.; which are, I think, sufficiently shewn, according to the strict literal sense of them, not to sustain the claim contended for; but if they could be supposed to do so, the claim is ex-

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precisely excluded by the terms of the exception contained in the statute, viz. “*nisi sit per voluntariam cessionem aut resignationem, aut deprivationem in foro civili aut ecclesiastico.*” Now can this possibly be deemed any other than a voluntary resignation of the deanery and canonry of *Exeter*, in order to obtain the future grant of the deanery of *Lincoln*, which it had been signified to the defendant that he might obtain on that condition? It was unquestionably voluntary, for it was the uncompelled election of a greater advantage, to be obtained afterwards, by the surrender of a less, which was to be parted with immediately: and the mode in which it was parted with was the one specifically mentioned in the exception, viz. that of *resignation*. Unless therefore, we can, in favour of some supposed intention of the framers of the statute, depart from the language used in it, and substitute, in the place of the words “by promotion,” the words “means used in order to obtain promotion,” we shall not bring the case even colourably within the first branch of the statute: and when we have done so, the express language of the exception, which excludes *voluntary resignation*, (the immediate cause of the vacancy in question,) at any rate puts an end to the claim altogether.

Postea to the Plaintiff.

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ROBINSON and Others *against* TOURAY.*Thursday,*
Feb. 11th.

THIS case was argued in *Easter* term last upon a rule nisi for a new trial, by the *Attorney-General*, *Park*, and *Gaselee*, against the rule; and by *Garrow*, *Nolan*, and *Carr*, contra. The cases of the *Cousine Marianne* (a), *Usparicha v. Noble* (b), and *Rawlinson v. Janson* (c), were cited by the former: those of the *Cosmopolite* (d), *Feize v. Thompson* (e), *Feise v. Waters* (f), and the case of the *Hoffnung* (g) by the latter. The case was adjourned for consideration, and on this day

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

This was an action upon a policy on goods by ship or ships from *Archangel* to *London*. It was afterwards declared to be on the *Neptunus*; but that declaration was cancelled, and it was declared to be on the *America*. The interest in the goods was averred to be in *Brandt, Rodde, and Co.*, who are *Russians*. The cause was tried at *Guildhall* at the sittings after *Michaelmas* term 1811, when it appeared in evidence that *Henry Siffken*, a resident *British* merchant, was employed on behalf of *Brandt, Rodde, and Co.* to obtain a licence for them, and had

A licence granted under an order in Council to *H. S.* (a *British* resident merchant), permitting a vessel, bearing any flag except the *French*, to proceed in ballast from any port north of the *Scheldt* to *Archangel*, there to load a cargo of such goods as are permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to *H. S.*, or any particular class of persons: and therefore where *Russian* subjects at *Archangel*, who were alien enemies, had shipped goods under such licence for the purpose of

being brought into this country, it was held that they were protected by it; and an insurance made for their benefit was legal.

A mistake made by the agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp.

(a) 1 *Edw. Adm. Rep.* 346.(b) 13 *East*, 332.(c) 12 *East*, 223.(d) 4 *Rob. Adm. Rep.* 8.(e) 1 *Taunt.* 121.(f) 2 *Taunt.* 248.(g) 2 *Rob. Adm. Rep.* 163.

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petitioned the Privy Council accordingly, and had thereupon obtained a licence, dated the 14th of *March* 1810, in these terms: In pursuance of an order of council, specially authorizing the grant of this licence, a duplicate of which order of council is hereunto annexed, I do hereby grant this licence for the purpose set forth in the said order of council to *Henry Siffken*, and do hereby permit a vessel, bearing any flag except the French, to proceed in ballast from any port, north of the *Scheldt*, to *Archangel*, or any other port in the *White Sea*; there to load a cargo of such goods as are permitted by law to be imported, (except *German* linens, stock fish, and oil,) and to proceed with the same to a port in the United Kingdom (a). Annexed to the licence is a duplicate of the order in council authorizing the same; stating it to be on the petition of *Henry Siffken*. The ship was admitted at the trial to be a neutral ship, viz. a *Rosstock* ship. A motion was made to set aside a verdict, which was given for the plaintiffs for the amount of the goods lost, on two grounds; first, that the declaration of the ship in the margin of the policy was not on a fresh stamp (b). But the Court refused the rule on that point. The second ground, on which the Court granted the rule to shew cause, was, that this licence did not authorize the importation of goods, the property of an enemy, as these goods were. This case was argued on shewing cause

(a) The licence went on thus; "The master to be permitted to receive his freight and depart with his crew and vessel to any port not blockaded: notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any neutral or hostile port, and to whomsoever such property may appear to belong, &c.

(b) The first declaration on the *Neptunus* was made by the agent through mistake, and, as soon as it was discovered, was rectified by altering the name to the *America*.

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against the rule for a new trial in *Easter* term last, when it was contended that the licence was personal to *Siffken*, and being so could not extend beyond him or persons ejusdem generis; and at any rate not to alien enemies. It was not denied but that the Privy Council had power to authorize an enemy to import goods; but it was said that in such case it should be directly so expressed in the licence; and that it was not so in the present case. But we think that by the terms of this licence the privilege is not personal to *Siffken* or to any particular class of persons: it is obtained, as it states on the face of it, upon the petition of *Siffken*, and therefore it may be that some degree of confidence placed in him, that the licence granted upon his petition should not be abused, might operate as an inducement to the granting of it: his name is inserted in the licence, as petitioning for it, and no more: but what is the licence granted for? It is for a vessel, *bearing any flag except the French*, to proceed in ballast from any port north of the *Scheldt* to *Archangel*; there to load a cargo of such goods as are permitted by law to be imported. The object of this licence is manifestly, upon the face of it, to procure a cargo of *Russian* goods to be brought into this country. It is not specifically to *Siffken*, or to any other person, to import, but for *any ship*, except a *French* flag, *to import*: so that it would authorize a *Russian* ship. She is to proceed also in ballast: there is no necessity to take out a cargo of *British* manufacture or colonial produce: so that the sole object is most clearly *to bring in Russian goods*, without any restriction as to person or ship, except that the ship should not bear the *French* flag. Under a licence couched in such terms, we do not feel ourselves warranted in saying that a *Russian* subject may not ship goods on board such vessel

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vessel for the purpose of their being brought hither, as well as sell them at a *Russian* port to a *British* or neutral merchant, for him to import them at his risk; and if so the *Russian* may, as a consequence of such right to import, legally make a contract to indemnify himself against loss during the voyage. Whatever doubts may have occurred on the effect of licences drawn up in different terms, we all agree in thinking that under this licence the insurance made for the benefit of the *Russian* house, although standing in a hostile relation to this country at the time, is legal. This same question has lately been under the consideration of the court of Common Pleas in the case of *Morgan v. Oswald*; and we understand that Court in the course of the last term gave the same effect to a licence similarly worded; indeed it appears to be the same licence. The consequence is, that the verdict which has been found in this case for the plaintiff must stand, and the rule which has been obtained to shew cause why it should not be set aside must be discharged.

Rule discharged.

SAME *against* CHEESEWRIGHT.

LORD ELLENBOROUGH C.J. also delivered the opinion of the Court in this case, which he observed was under the same circumstances as *Robinson v. Touray*, at least as to the point on which the Court granted the rule to shew cause; for although other objections were taken, the Court disposed of them on the motion for the rule, and only granted it on the objection respecting the licence, whether it protected enemies' property. The verdict therefore in this case also must stand. And the rule be discharged.

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The KING *against* The Inhabitants of DENHAM.*Thursday,
Feb. 11th.*

UPON appeal, the quarter sessions for the county of *Southampton* confirmed an order for the removal of *Charles Tranter*, his wife and family, subject to the opinion of this Court on a case stated. The case was argued in *Michaelmas* term last by *Maule* in support of the order of sessions, and by *Gaselee* and *Selwyn* contra. The Court took time to consider; and on this day

The 40 days residence necessary to confer a settlement by hiring and service, must be within the compass of a year.

Lord ELLENBOROUGH C. J. delivered the judgment.

This was a settlement case upon a removal from *Basingstoke* to *Denham*, and the question was upon the residence necessary to confer a settlement by hiring and service, whether it was necessary there should be 40 days residence within the compass of a year; or whether, if the service were for several years uninterruptedly, a residence of 40 days within those several years would be sufficient. The facts were these; the pauper was hired for a year to *George Smith*, and served that year: at the expiration of which he was hired to him for another year, and served half of it; and during that year and a half he was resident in *Basingstoke* for 40 days, but he did not reside in *Basingstoke* for 40 days either within the first year, or within the half year, nor (as was admitted) within any one period of a year whilst he continued with *Smith*. The sessions were of opinion that this residence was not sufficient, and we think their opinion right. By stat. 13 & 14 Car. 2. c. 12. s. 1. poor persons coming to settle in any parish, if likely to be chargeable to the parish, may be removed within 40 days after they
fo

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to come to settle as aforesaid; and it is under this act that 40 days residence is required. By stat. 1 Jac. 2. c. 17. §. 3. the 40 days continuance in a parish, intended by the stat. 13 & 14 Car. 2. to make a settlement, shall be accounted from the delivery of notice in writing to one of the officers of the parish to which such poor person removes; which notice, by stat. 3 & 4 W. & M. c. 11. §. 3., is to be read in church the next *Lord's-day*, and registered in the book kept for the poor's accounts. By the same statute 3 & 4 W. & M. c. 11. §. 7. if any unmarried person, not having child or children, shall be lawfully "hired into any parish or town for one year, "such service shall be adjudged a good settlement there- "in, though no such notice in writing be delivered and "published as aforesaid." And by stat. 8 & 9 W. 3. c. 30. §. 4. "No person, so hired as aforesaid, shall be "adjudged to have a good settlement in any such parish "or township, unless such person shall *continue and abide* "in the same service during the space of *one whole year*." Upon these clauses settlements by hiring and service now stand. It has been decided that so as there is a hiring for a year, and service for a year, it is not necessary the whole of the service should be under the yearly hiring, but service not under a yearly hiring may be connected with service under a yearly hiring, and both services, if uninterrupted, may be taken into the account: but it has never been decided that residences beyond the compass of a year can be connected; and as the legislature, by requiring a hiring for a year, and a continuance and abiding in the same service during the space of one whole year, seem to have contemplated something which was not to be complete in less than a year, but was to be complete within that period; we think

think we abide most closely by the words, and give effect to the most probable intention of the legislature, by holding that the whole residence must be within the compass of a single year. Suppose the same service to continue uninterruptedly for 20 years, and the servant to sleep twice in every of such 20 years at the same inn in travelling, and to be at that inn the last night of his service, would it be expedient and reasonable that an inquiry extending over so long a period of time at detached intervals should be gone into for the purpose of ascertaining the settlement of a pauper? What notice could the officers of that parish have had that he was come to settle there? and yet there his settlement would be, if we were to hold that residence for 40 days beyond the compass of a single year would do. We are therefore of opinion that a settlement in *Basingstoke* in this case was not established, and that the order of removal and the order of sessions, which proceeded upon the disallowing the settlement, should be confirmed.

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SAMUEL PAYNE and JOHN THOROUGHGOOD'S
Case.

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SCARLETT on a former day in this term obtained a rule nisi for a writ of habeas corpora to the commander of his majesty's ship *Musquito*, to bring up *John Thoroughgood* and *Samuel Payne* for the purpose of being discharged, as having been illegally impressed.

By the affidavits in support of the rule it appeared that several persons who were the owners of fishing smacks at

upon the coast of *Heligoland* for the purpose of supplying the *London* market with that fish; and therefore the Court discharged a mariner and an apprentice who had been impressed out of one of the vessels engaged in that fishery.

The 50 G. 3.
c. 108. s. 2.,
which exempts
certain persons,
who shall be
employed in the
fisheries of these
kingdoms, from
being impressed,
extends to a
lobster fishery,
carried on by
British subjects

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Harwich, had formed themselves into a company for carrying on the lobster fishery upon the coast of *Heligoland*, in pursuance of which plan in the spring of 1812 they sent out eight strong-built vessels, furnished with wells, fishing nets and baits, &c. and with 24 boats of a peculiar construction, and adapted to the said fishery, besides the boat attached to each smack upon the ordinary fishing business. The mode of conducting this fishery was as follows: all the vessels of the company sailed nearly together in the beginning of the season, and when arrived at their station the boats, masters and crews were engaged in catching the lobsters, with which they supplied such vessels of the company as were ready for the *London* market. The vessels when loaded immediately sailed for *London*, and delivered the lobsters at *Old Haven* for the *London* market, and then returned with all dispatch to their station. The nets, &c. after being carried out on the first voyage, remained at *Heligoland* until the fishing season was over. The fishing for lobsters is usually in water from 7 to 12 fathoms deep, and hardly ever so shallow as 2 fathoms. The *Adventure*, one of the eight vessels abovementioned, was of the burthen of 59 tons, and regularly cleared out at the custom-house at *Harwich* for the voyage in question, and had a licence to be employed in fishing for lobsters at *Heligoland*. On the 1st *June* 1812 she was in the North Sea, about 40 miles to the westward of *Heligoland*, bound to the said island for the purpose of catching lobsters for the *London* market, when an officer of the *Musquito* came on board and impressed *Payne* and *Thoroughgood*. *Payne* was a mariner of the age of 29 years, regularly bred to the fishing business, and *Thoroughgood*, (of the age of 19 years) was apprentice to the owner of the *Adventure*, bound for 7 years, to learn the

the

the art of a fisherman; and both of them, at the time of their being impressed, were employed in the fishing service, and had regular admiralty protections. The island of *Heligoland* surrendered to his majesty's forces on the 1st *September* 1807. The exemption from being impressed was claimed under the stat. 50 *Geo.* 3. c. 108. s. 2.

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The Solicitor-General and *Jervis*, who now shewed cause, contended that these persons came neither within the stat. 2 *Geo.* 3. c. 15. nor the stat. 50 *G.* 3. c. 108. The first of those acts applied only to persons fishing on the coasts and in the navigable rivers of *Great Britain*: the second to those who fished in deep waters: and although sect. 2. includes persons employed in the fisheries of these kingdoms, yet it can hardly be intended by that expression that it contemplated a fishing off *Heligoland*; and even if it did, still that expression must be controlled by the words used in the preamble, otherwise it would include every fishery of what kind soever, whereas the words of the preamble do not extend beyond fishing in the deep seas. But lobsters are a species of fish only to be found in shoals among rocks, and are caught, not in boats or by means of implements used for fishing in deep waters, but in skiffs with lobster pots: and although larger vessels may be necessary in order to navigate in deep waters to and from the fishing station, that is only preliminary to the fishing.

Topping and *Scarlett* in support of the rule, insisted that the words in the 2d sect. were not to be restrained by the preamble in the manner contended for; and then, the

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only question was, whether this could be deemed a fishery of this kingdom : as to which it appeared, that it was a fishery carried on by *British* subjects, and in vessels, and with a capital all *British*, and the produce of which was brought into the markets of this country. They were proceeding in the argument, but were stopped by

LORD ELLENBOROUGH C. J. I think the policy of the legislature is described in the preamble of this act of parliament, and its object seems to have been directed to the better supplying the inhabitants of the metropolis and other parts of the kingdom with fish, and for that purpose to bring sound and wholesome fish at a moderate price to the different markets of the kingdom. It is contended however by those who oppose this rule, that this act of parliament only extends it's protection to those who are engaged in fishing in deep waters, and that lobsters are found in shallow water. Now the act recites that it has been found since the passing of the 2 *Geo. 3. c. 15.* that various sorts of fish retire in the winter season into deeper water, and it has therefore become necessary for the supply of the metropolis and other parts of the kingdom with such fish at all seasons of the year, to use larger classes of fishing vessels, which cannot be navigated without a greater number of hands than are exempted by the former act, and that the encouraging the taking of apprentices is highly beneficial in establishing a nursery for his majesty's navy ; and it is therefore expedient that the provisions of the former act for exempting persons employed in the vessels therein described, should, as to all fishing vessels, be extended to fishing in the deep seas beyond the coasts, &c. The 2d sect. then enacts, " that every
person

person therein specified who shall be employed in the fisheries of *these kingdoms* shall be exempted from being impressed, except in certain cases." These words are large enough to embrace the present case; and it would have been easy for the legislature, if they had intended to narrow the privilege to those who fished in deep waters only, to have used apt words for that purpose by recurring to the words recited in the former section. Instead of that, however, in furtherance of the general policy of the former act, which was to supply the metropolis with fish at a moderate rate, the legislature has adopted a larger form of expression by proposing generally that those employed in the fisheries of these kingdoms should be protected. The question then is reduced to this, viz. what is meant by the "fisheries of these kingdoms." These kingdoms have coasts, and what may be termed a land jurisdiction, extending between high and low water mark, in contradistinction to the admiralty jurisdiction. That would clearly be too narrow a construction of the words. But then when we get beyond that, to the "deep seas beyond the coast," a difficulty arises in defining how far they shall extend, and therefore the legislature seem to have defined it by the words "fisheries of these kingdoms," which are words of a large scope, embracing all those fisheries from which fish are supplied in a fresh and wholesome state to the markets of these kingdoms. The act therefore must be taken to mean all such fisheries within the neighbourhood of these kingdoms, which are capable of contributing and do contribute to the better supply of the markets of these kingdoms with fresh fish: and all who are engaged in such fisheries under certain limitations seem to be

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within the policy of the act. I therefore think these two persons are entitled to their discharge.

LE BLANC J. I am of the same opinion. We must look to the former statute for the true construction of this. The principal object of that statute, as its title imports, was the better supplying the inhabitants of this metropolis with fish, and the reduction of the exorbitant price of that article. In it there are many regulations which do not apply to the protection of the fishermen: then comes the clause that protects them under certain limitations. Afterwards, it appears to have been thought expedient to provide for the supply of the markets of *these kingdoms* with wholesome and sound fish brought from a greater distance; for the 50 G. 3. recites, that the fish at a certain season retire into deeper water, and it has therefore become necessary for the supply of the metropolis, and other parts of the kingdom, to use a larger class of vessels. Then the act repeals the former, and extends the protection to all persons employed in the *fisheries of these kingdoms*. Under these words therefore I think we may fairly comprehend those persons who are employed in supplying the *London* markets with good and wholesome fish. It is said that the vessels immediately employed in fishing are very small vessels or skiffs: but it is clear that much larger vessels are indispensably necessary to carry both them and the fishermen through the deep seas, and that they are equally necessary after the fish are taken to bring them home to the markets of *Great Britain*.

BAYLEY J. I am of the same opinion. By the first act there were four descriptions of persons who should

be employed in the fisheries of these kingdoms exempted from being impressed. The 50 G. 3. c. 108. repealed that act, but it also extended the privileges in respect of vessels of larger burthen.

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Rule absolute.

BERGER *against* GREEN.

Thursday,
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LAWES shewed cause against a rule obtained by *Espinasse* for referring a bill of exchange to the master to compute principal and interest, on the ground that the plaintiff was dead at the time when the rule was obtained. It appeared that interlocutory judgment was signed on the 27th of *January* last, that the plaintiff died on the 30th, and that this rule was granted on the 1st of *February*. He contended that the suit abated by the plaintiff's death, after which the only mode of proceeding was that pointed out by 8 & 9 *W. 3. c. 11. s. 6.*, viz. by a *scire facias*, and that the Court would not permit final judgment to be signed for the plaintiff according to the terms of the rule.

Where inter-locutory judgment was signed, and the plaintiff died on a subsequent day in the term; the Court granted a rule to compute principal and interest on the bill on which the action was brought.

Espinasse, contra, maintained that the whole term was to be considered as one day, and that when final judgment was signed it would relate back to the first day of the term, which was prior to the plaintiff's death; and that this was analogous to a case at the assizes, where if a party died between the commission day and the day of trial, the cause might notwithstanding be tried. He relied on *Bragner v. Langmead* (a)

(a) 7 *T. R.* 20.

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LE BLANC J. (a). It is perfectly clear that final judgment may be signed notwithstanding the death of the party, and that the Court will not set it aside on account of his death, before it was signed. This is an application merely to inform the Court for what damages judgment may be signed, and if this preliminary step were not necessary, the party might at once sign final judgment. If then the Court would permit final judgment to be signed, notwithstanding the death of the party, they will hardly on that account refuse this rule, which is only a means of getting final judgment. When signed it will relate back to the first day of the term, and error will not be assignable, for it will not appear on the record that the party was dead before final judgment was signed. The defendant cannot sustain any injury, because execution cannot go against him without a scire facias.

BAYLEY J. concurred.

Rule absolute.

(a) Lord Ellenborough C. J. was absent.

Thursday,
Feb. 11th.

DALTON *against* BARNES.

A special capias issued upon an affidavit sworn at the bill of *Middlesex* office is irregular: but if the defendant be arrested under it, and put in special bail, he thereby waves the irregularity.

THE defendant in this cause having been arrested upon a special capias, a rule was obtained by *Taddy* for discharging him on entering a common appearance, on the ground that the affidavit of debt, upon which the writ issued, was sworn at the office where bills of *Middlesex* issue, and not before the filazer or his deputy.

Marryat,

Marryat, who shewed cause against the rule, admitted that the affidavit was not sworn before the proper officer, but contended that the practice was for the filazer, upon transmitting to him either the original affidavit or an office copy of it, to issue his writ: but the Court said that such could not be the practice, for that an affidavit made for one specific object could not be transferred to another, and perjury could not be assigned on the office copy. He then contended that the want of an affidavit had been waived by the defendant's having put in special bail.

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Taddy, in support of the rule, insisted that the arrest was illegal, for want of an affidavit made before the proper officer, as required by stat. 12 G. I. c. 29., and therefore what was done by the party as to putting in bail was to be considered as having been done under duress, and consequently void. He relied upon what was said by Lord *Kenyon* C. J. in *Norton v. Danvers (a)*, "that if the defendant had been actually under arrest at the time, his consent to give a bail bond would not have been binding, because it might be considered as given under duress." He also cited *Reeks v. Groneman (b)*.

LORD ELLENBOROUGH C. J. The recognizance of bail does not import necessarily that there was an affidavit to hold to bail; it is not per se necessarily founded thereon. I think there was an irregularity; but there is a time for taking notice of such irregularities, and if that is suffered to elapse, the party must be considered as having dispensed with it.

(a) 7 T. R. 376.

(b) 2 Willf. 224.

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LE BLANC J. concurred.

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BAYLEY J. added, that there was not any instance in which the party after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail.

Rule discharged.

Friday,
Feb. 12th.RANDOLE *against* BAILEY and Another. In Error.

The clerk of the errors in *C.P.* in transcribing the record, by mistake entitled it generally instead of specially, and error was assigned thereon; after which he amended the transcript by inserting the special memorandum; the Court would not restore the transcript to the state in which it stood at the time when the plaintiff in error assigned his error.

IN this case the defendants in error declared in the Common Pleas, as drawers, against the plaintiff in error, as acceptor of a bill of exchange, which became due on a day in *Trinity* term. The declaration was specially entitled as of a subsequent day in that term. Plea, Judgment recovered. Replication, nul tiel record, and thereupon final judgment for the defendant in error. A writ of error was brought in this court, and the clerk of the errors in transcribing the record, instead of entitling the declaration specially, entitled it generally; and the plaintiff assigned this for error. Afterwards the clerk of the errors altered the transcript by inserting the special memorandum as it originally stood: whereupon *Marryat* obtained a rule, calling on the defendants in error to shew cause why the transcript of the proceedings should not be restored to the state in which it stood at the time when the plaintiff in error assigned his error.

Scarlett and *Comyn* opposed the rule, on the ground that the clerk of the errors, in transcribing the record, acted as the agent of the plaintiff in error; and therefore

fore the mistake must be considered as the mistake of the plaintiff himself; and so he ought not to be permitted to avail himself of it.

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—
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Marryat, in support of the rule, maintained, that although the Court, upon application, might have granted liberty to amend, yet the officer, even with the consent of the parties, could not make the amendment; much less could he do so without their consent. If the party himself was at liberty to amend without leave of the Court, there never would be occasion for alleging diminution. And he relied on *Dickinson v. Plaisted* (a), where the Court held that the plaintiff himself could not alter the roll by inserting a special instead of a general memorandum.

BAYLEY J. (the only Judge in court,) observed, as to that case, that the alteration was not warranted by the original record; and as to the principal case, delayed giving judgment until the court was full; and then, after conference with the other learned Judges, said, that it seemed to them, that as the clerk of the errors was the agent of the plaintiff in error in making the transcript, and the plaintiff, through him, ought to have known that the record was incomplete without the alteration, therefore the clerk should have authority to make it complete; and that the rule ought to be

Discharged.

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Friday,
Feb. 12th.

JACKSON *against* PESKED.

If the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment: therefore where the plaintiff declared as reversioner of a yard and part of a wall which *W. F.* occupied as tenant to him, and that the defendant on, &c. and on divers days, &c. wrongfully placed on the said part of the wall quantities of bricks and mortar, &c., and thereby raised it to a greater height than before, and placed pieces of timber, &c. on the said wall, overhanging the yard, per quod the plaintiff during all the time lost the use of the said part of the wall, and also by means of the timber &c. overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and said part of wall have been injured, to the damage of the plaintiff, &c.; without stating that his reversion was prejudiced: the Court arrested the judgment.

ACTION upon the case. The declaration stated, that before and at the time of committing the grievances hereinafter mentioned, a certain yard and part of a certain wall, situate, &c. was in the possession and occupation of one *William Frisk*, as tenant to the plaintiff, the reversion thereof then and still being in the plaintiff, to wit, at, &c.; yet the defendant well knowing the premises, but intending to injure and aggrieve the plaintiff in his reversionary estate and interest of and in the said yard and the said part of the said wall, heretofore and whilst the said yard and the said part of the said wall were so in the possession and occupation of *Frisk* as tenant of the plaintiff, and whilst the plaintiff was so interested therein as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, at, &c. wrongfully, injuriously, and without leave and against the will of the plaintiff, erected, put, and placed upon the said part of the said wall divers large quantities of brick and mortar and other materials, and thereby raised the said part of the wall to a great height, to wit, the height of three feet more than the same had been before that time, and also put and placed divers pieces of wood and timber, and tiles upon the said wall overhanging the said yard, to wit, at, &c.;

by reason whereof, &c. (a) After verdict for the plaintiff on the general issue, with 1s. damages, a motion was made in arrest of judgment: against which *Jervis* and *Comyn* shewed cause, and *Lawes* was heard in support of it, on a former day in this term.

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LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an action by a reversioner for an injury done to a yard and part of a wall of which the reversion belonged to him, and the plaintiff obtained a verdict; but it not being alleged in the declaration that the acts done were to the damage of the plaintiff, as such reversioner, or that his reversionary estate and interest was thereby depreciated or lessened in value, the defendant obtained a rule nisi to arrest the judgment. The declaration contained only one count, and that count stated several acts which are ordinarily stated in declarations of trespass as mere injuries to the possession, viz. putting and placing upon part of a wall of the plaintiff quantities of brick and mortar, and thereby raising the same to a great height, and putting and placing pieces of timber, wood, and tiles upon the wall overhanging the said yard. The plaintiff also added, as consequential damage, “ by reason whereof
 “ not only the said plaintiff during all the time aforesaid
 “ lost the use and advantage of his said part of the
 “ wall,” (that is, sustained a temporary loss affecting the occupation and enjoyment thereof merely, which he had not, not being in possession,) “ but also by means of the said
 “ wood, timber, and tiles so overhanging the said wall,

(a) The concluding part of the declaration will be found in the judgment of the Court.

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“ large quantities of rain and moisture have from time to
 “ time during all the said time run and flowed from
 “ the top of the said wall upon the yard of the plaintiff,
 “ and the said yard and the said part of the wall have
 “ been greatly injured and damnified.” And the ques-
 tion seems to be whether, in the absence of any such
 allegation as is usually, and (I believe) invariably made
 in declarations of this sort, that thereby *the plaintiff’s re-*
versionary estate and interest in the premises were damaged
 or prejudiced, or lessened in value, we must infer that
 the water drip so described had a permanently injurious
 effect of this nature. It is not stated that the foundation
 of the wall was injured or undermined, or that the yard
 was more injured thereby as being wetted. The Count
 does not import in terms that any act charged upon the
 defendant was injurious or to the damage of the plaintiff:
 the declaration does indeed contain the usual conclusion,
 “ Wherefore the plaintiff saith he is injured and hath
 “ sustained damage, &c. :” but this is not matter of
 charge in the declaration, it is only the resulting infe-
 rence of damage drawn by the plaintiff from the matter
 of charge; and unless the count, which is the matter
 of charge, warrants such inference, it has no effect; and
 in truth, although this part of the declaration was
 brought under our notice, but little stress was laid upon
 it as a special allegation of damage in the argument. The
 main point relied upon was this, that after verdict the
 Court would infer that the plaintiff was confined at the
 trial to the proof of such an injury as would be preju-
 dicial to the reversion, and that all evidence short of this
 effect must be supposed to have been excluded; and it
 was with a view to look into this point that the Court
 forebore giving its judgment at the time. Where a
 matter

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matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms as applied to the subject matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because in the extreme latitude of the terms such a sense might be affixed to them. The rule by which we must go, must be one applicable to all actions, in inferior as well as superior courts; to cases in which the judge has no power to grant a new trial as well as to those in which there is such power; and to cases in which, if the jury do not think fit to follow the judge's direction, there is no power to correct their decision: and we must take care therefore not to extend the rule (if it has not been already extended further) beyond those cases in which we must presume the judge to have given a right direction, and the jury to have followed it. In *Barber v. Fox*, 2 *Saund.* 136. the heir of an obligor was sued upon a promise in consideration of forbearance: he pleaded non assumpsit, and there was a verdict against him. It was then moved in arrest of judgment, because it was not alleged that the bond in this case bound the obligor's heirs.

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heirs. It was answered, that the verdict had cured the objection; for if the heir was not bound, the jury should have found for the defendant; and it ought therefore of necessity to be intended that the obligor bound his heirs: but the Court held they could not make the intendment; and the judgment was arrested. *Hunt v. Swaine*, 1 *Lev.* 165. and *Sir T. Raym.* 127. are to the same point. In *Buxendin v. Sharp*, *Salk.* 662. in an action for keeping a mischievous bull, there was no scienter in the declaration; and after verdict for the plaintiff, the judgment was arrested on that account; and the Court said they “could not intend it was proved at the trial; for the plaintiff need not prove more than is in his declaration:” and yet every lawyer is aware that a knowledge of the mischievous nature of the animal is of the essence of such an action, and would therefore never suffer a jury, if he could controul them, to find for the plaintiff in such a case, unless such a knowledge in the defendant were proved. In *Nerot v. Wallace*, 3 *Term Rep.* 25. *Buller J.* says, “after verdict every thing shall be intended which the allegations of the record require to be proved;” but do the allegations of the record in this case properly require an injury to the reversion to be proved, or will they not be more justly and naturally satisfied by an injury to the possession only? The case most favourable for the plaintiff which I have been able to meet with, is *Jenkins v. Turner*, *Ld. Raym.* 109.; where, upon a declaration for keeping a boar accustomed to bite, which had bitten a mare of the plaintiff; the allegation was that he was accustomed to bite “animals;” and it was urged, upon a motion in arrest of judgment, founded upon the generality of this word, that those animals might be frogs or such animals; to which

Powell J. answered, that the judge of assize knew well that this would not be actionable unless the boar had been used to bite horses, sheep, &c. and not frogs; and consequently if that had not been proved, he would not have suffered the jury to have given a verdict for the plaintiff; and therefore they would intend that the evidence was of biting such animal as would support the action. It may be observed, however, upon this case, that it would have been a forced and unnatural construction to have applied the word animals to frogs or such animals, and that the sense in which the Court understood the term is the sense in which alone a judge and jury would naturally understand it. And *Powell* J. said it might have been a question in the case of keeping a dog, whether *ad mordend. animalia consuet.* had been good, because then it might have been intended more generally of animals *feræ naturæ*, which it is the nature of a dog to kill. As therefore there is no authority, upon which we can say we are warranted in presuming that the jury were confined to such injuries as would *necessarily prejudice* the reversion; as the charge in the declaration is conceived in such terms as to include injuries which are not necessarily prejudicial to it, but more aptly and naturally applied to injuries to the possession only; and as the plaintiff has not charged that the reversion was prejudiced, or that the plaintiff was damnified in respect thereof, we are not warranted in inferring that such a prejudice out of the natural and ordinary scope of the allegation must have been proved; and therefore the rule for arresting the judgment must be made absolute.

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Friday,
Feb. 12th.

MIDDLETON *against* HILL and Another.

The lien of the plaintiff's attorney upon the debt and costs recovered in the cause after affirmance upon writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff; and costs in error are costs in the cause.

IN this case the defendants had recovered against the plaintiff a judgment for 150*l.* upon a contract for the sale of hemp; and afterwards the plaintiff, in a counter-action upon the same contract, recovered against them the sum of 367*l.* 10*s.* for his damages and costs. Judgment was entered up, and writs of error brought in both actions; and in the former the judgment being affirmed, and damages and costs awarded to the defendants, amounting to 1580*l.* 19*s.* 3*d.*, the defendants issued a ca. fa. against the plaintiff, indorsed to levy 1213*l.* 9*s.* 3*d.*, being the balance after deducting the sum recovered by the plaintiff in his action against them; upon which ca. fa. the plaintiff was taken in execution. Afterwards the plaintiff sued out execution against the goods of the defendants for the amount of the judgment recovered by him, together with the costs upon the affirmance of that judgment; which sum the defendants paid into the hands of the sheriffs of *London* under that execution. Whereupon, on a former day in this term, the defendants obtained a rule nisi for setting aside the fi. fa. and restoring the sum of money which they had paid under these circumstances into the hands of the sheriffs.

The Solicitor-General and *Puller* now shewed cause, and contended, 1st, That the defendants having taken the body of the plaintiff in execution had thereby received satisfaction for the whole amount of the judgment recovered

covered by them, and therefore could not claim the benefit of any supposed deduction allowed in his favour; 2dly, that the defendants would by this mode of proceeding oust the plaintiff's attorney of his lien on the judgment for his costs; and they cited *Mitchell v. Oldfield* (a), *Read v. Dupper* (b), *Randle v. Fuller* (c), and *Howell v. Harding* (d). They admitted that a different practice had prevailed in the Common Pleas, where the Court has allowed one judgment to be deducted from another, without regard to the attorney's lien, *Vaughan v. Davies* (e).

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Marryat, contra, relied upon *Vaughan v. Davies*, and said that in *Howell v. Harding* this Court also allowed the plaintiff to set off interlocutory costs payable by him to the defendant against the debt recovered by him on the final judgment, notwithstanding the lien of the defendant's attorney on those costs.

LORD ELLENBOROUGH C. J. There is no case, I believe, in which the practice of the Common Pleas has been adopted in this court; and even there it is done by application to the Court, and not by the mere act of the parties themselves, as in this case. The Court will now do what it would have done if application had been made to set off this judgment against the other; it will take care that the attorney's lien for his costs is not defeated.

The Court made the rule absolute for setting aside the fi. fa. and restoring the money paid to the sheriffs after

(a) 4 T. R. 123.

(b) 6 T. R. 361.

(c) *Id.* 456.

(d) 8 East, 362.

(e) 2 H. Bl. 440.

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deducting the costs of the plaintiff's attorney, upon satisfaction being entered by the defendants for the money so returned to them : and, upon *Marryat's* praying that those costs might not include the costs in error, the Court added that they thought the costs in error were costs in the cause ; for the plaintiff was not in full possession of his judgment until the writ of error was determined.

Friday,
Feb. 12th.

FORT and Others, Assignees, &c. against
CATHARINE OLIVER, Administratrix, &c.

Where plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment : Held that he could not have a scire facias against his administrator ; for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant.

THE plaintiffs brought an action against the defendant's intestate, *Oliver*, and one *Smith* ; and after proceeding to outlawry against *Smith*, went on with the action against *Oliver* alone ; who died after interlocutory and before final judgment. The plaintiffs afterwards sued out a scire facias against the defendant, *Catharine*. Whereupon *Holroyd* obtained a rule nisi for setting aside the scire facias and all subsequent proceedings, for irregularity.

The Solicitor-General and *Parnter* shewed cause, and contended, that by means of the process of outlawry against *Smith*, the action became a separate action against *Oliver* alone ; and, consequently, upon his death the plaintiffs were entitled by the stat. 8 & 9 *W. 3. c. 11. s. 6.* to have a scire facias against the defendant.

But the Court held, that notwithstanding the outlawry the action continued joint ; and that the remedy only

was severed by the impediment caused by the outlawry of going on with the suit against one of the defendants: but that did not alter the right as it originally stood; and in a joint action, where one of the defendants dies, as in this case, the proceeding must be against the survivor.

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Rule absolute.

END OF HILARY TERM.

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C A S E S

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ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-Third Year of the Reign of GEORGE III.

HOSKINS *against* KNIGHT.

BASSET and Another *against* Same.

Wednesday,
May 5th.

THIS was a rule calling on the plaintiffs to shew cause why the sheriff of *Hants* should not pay to *Robert* and *William Sanders* the sum of 90*l.* for rent due to them, out of the produce of the goods of the defendant taken and sold under two writs of fieri facias issued in these causes.

The landlord of premises upon which the goods of his tenant are taken in execution can only claim from the party suing the execution the rent due at the time of taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession.

The case was this: the sheriff on the 11th of *June* 1812, by virtue of the said writs issued by the plaintiffs, seized the household goods and other stock in trade upon the premises of the defendant, which he held as tenant at will to Messrs. Sanders at a yearly rent of 180*l.* A short time afterwards the sheriff sold some part of the goods, but in consequence of some arrangement between the plaintiffs and the defendant he retained possession of

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the remainder until the 2d of *November* following, when they were also sold.

The question was, whether Messrs. *Sanders*, as the landlords, were entitled to demand of the plaintiffs (the parties suing the said executions) payment of rent which accrued after the time of taking the goods in execution, and during the continuance of the sheriff's possession.

Burrough shewed cause against the rule, and relied on the express words of the statute 8 *Ann. c. 14. (a)* to shew that the landlord is only entitled to the rent due at the time of the sheriff's entering into possession, and not to rent which accrues subsequently during the continuance of the sheriff in possession.

Gaskell, contra, contended that this being a remedial act ought to be construed liberally for the benefit of the landlord, and that under such a construction the words "at the time of the taking such goods" might be intended the time of removal; otherwise a sheriff might continue in possession of the premises as long as he thought fit, and the landlord would be deprived of all remedy to recover his rent during such possession.

(a) By 8 *Ann. c. 14.* it is enacted, that "no goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution."

But

But the Court held, that there was nothing which required the statute to be extended beyond the literal meaning of the enacting clause. The words of that clause expressly pointed to the time of the taking, and shewed that the legislature contemplated one case only in aid of the landlord, viz. that of providing against the consequence of an execution sweeping away what is due for rent at the time when the seizure is made; but the statute went no farther. If the sheriff remain beyond a reasonable time on the premises so as to injure the rights of the landlord, the latter may have his remedy by means of an action upon the case.

Rule discharged.

DOE *against* REYNOLDS and SAWYER, (Bail in Error.)

*Wednesd. 2,
May 5th.*

THE defendants, against whom an action had been brought on the recognizance of bail, obtained a rule nisi for staying proceedings in the said action on payment to the plaintiff's attorney of the sum of 37*l.* 10*s.* for the damages, costs and charges in the former action of ejectment, together with the costs of this action, to be taxed by the master.

Bail in error are not chargeable in an action upon the recognizance with mesne profits, where they have not been ascertained by writ of inquiry pursuant to 16 & 17 *Ger.* 2. c. 8.

The question was, whether the defendants were liable in this action to a further sum of 270*l.* 16*s.* 8*d.* for mesne profits. The declaration (as appeared by the affidavit in support of the motion) set out the recognizance in the usual form, which was conditioned for payment to the plaintiff, if the writ of error should not be prosecuted with effect, of the damages, costs and charges adjudged on the said judgment, and also all such costs and charges as

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should be awarded to the plaintiff for delaying the execution of the said judgment by pretext of the writ of error; it then alleged that the plaintiff in error did not prosecute the writ of error, but therein failed and made default; and that in *Hilary* term 1812 it was considered by the Court that the plaintiff in error should take nothing by her writ, but should be in mercy, and the plaintiff go thereof without day; and that the plaintiff in error had not satisfied or paid the plaintiff the damages, costs and charges aforesaid adjudged upon the said judgment, but the same remained wholly unpaid, &c.

Littledale, who opposed the rule, contended that the bail in error were liable for mesne profits under the breach assigned for non-payment of the damages, costs and charges, &c. the case being expressly provided for by stat. 16 & 17 *Car. 2. c. 8. s. 3 & 4.* [Lord *Ellenborough* C. J. Does the statute give any more than appears to be awarded upon the affirmance of the judgment in the court of error? It does not appear that that affirmance allows any thing in the shape of mesne profits.] The 4th section provides “that the court wherein execution ought to be granted upon affirmation, discontinuance, or nonsuit, shall issue a writ to enquire of the mesne profits after the first judgment, and upon return thereof judgment shall be given and execution for such mesne profits.” It is true indeed that no such writ of inquiry has been issued; and perhaps it will be said after the action on the recognizance has been brought that it is now too late; but if that be so, the Court will allow this action to be discontinued in order to afford the means of pursuing the remedy given by the statute.

LORD ELLENBOROUGH C. J. The plaintiff is not without remedy, but may still resort to the defendant in the original action for the recovery of the mesne profits. He had an opportunity of charging the bail with them; but if he has let that opportunity slip, I do not see that he is particularly intitled to indulgence as against the bail. The Court must look to the record as it now stands. The bail are charged in a particular manner, and the plaintiff, if he is too late to charge them in any other, must be content with resorting to the principal. I see no reason however why he should not be permitted to discontinue, although perhaps there may be a difficulty in assigning such a breach as will comprehend the mesne profits when ascertained under the statute; but I am not prepared to decide upon that question: at all events it will be an expensive mode of proceeding.

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The Court allowed Littledale time to consider whether he would discontinue.

Marryat was in support of the rule.

LUCAS and Others *against* DE LA COUR.

*Thursday,
May 6th.*

ACTION on the case. The plaintiffs were partners, and declared that they were possessed of a large quantity of Carthagena bark, which was on board a certain ship in the river *Thames*, bound for a certain port, and that the defendant agreed with them to take charge of the said bark upon certain conditions specified in the

Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject matter of the contract was his property alone:

Held that his declaration was evidence against all the partners, and therefore they could not sue jointly upon such a contract.

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declaration. The 2d count stated, that in consideration that the plaintiffs had retained and employed the defendant to cause certain quantities of bark of the plaintiffs to be sold on their account on a certain commission, &c., the defendant undertook to render them a reasonable account, &c. There were also the money counts. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, the plaintiffs were nonsuited upon the following evidence. In order to prove the defendant's handwriting to the agreement stated in the declaration, which agreement was made with one of the plaintiffs only of the name of *Moravia*, the plaintiffs called the clerk of the defendant, who upon cross-examination stated that he had had conversations with *Moravia* on the subject of the contract; that he had heard him say upon all occasions that the bark was his property, and belonged to no other, and had been allotted to him out of the partnership stock; and that he offered the defendant to become a partner with him in the sale of it.

Topping now moved to set aside the nonsuit on the ground that the bark must be taken to be the joint property of all the partners, notwithstanding the evidence of what passed in conversation with *Moravia*; it being not competent to one partner, to defeat the title of his co-partners to any portion of the joint property, by a declaration that such portion belonged to himself alone.

LORD ELLENBOROUGH C. J. It struck me at the trial that without considering this as evidence that the property belonged to *Moravia* alone, yet if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must

must be content to do so according to the mode in which the contract was made.

BAYLEY J. The declaration of *Moravia* was certainly evidence against the plaintiffs.

Per Curiam,

Rule refused.

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LEONARD *against* BAKER.

Thursday,
May 6th.

TROVER for goods taken in execution by the defendant (sheriff of *Worcestershire*) upon a judgment obtained in *Michaelmas* term last by one *Collins* against *John Clee*.

At the trial before *Bayley J.* at the last assizes for the county of *Worcester*, it appeared that *Clee* was a carpenter and resided in a house at *Perthore* with his wife, who let lodgings. The plaintiff was the son of *Clee's* wife by a former husband. On the 17th of *January* 1812, *Clee* being then insolvent, by bill of sale (to which *Collins* was not a party) assigned all his effects to two of his creditors in trust for themselves and the rest of the creditors; and shortly afterwards absconded, leaving his wife in possession. Within two or three days after the execution of the assignment, a person from the trustees came upon the premises and took away a saw; and a man was put into possession of the goods on behalf as well of the trustees as of the landlord of the house, who had distrained for rent before the assignment. On the 23d of *January* the assignment was advertised in the *Worcester* paper, and it was notorious at *Perthore* that *Clee* had executed it;

Where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods, and notice of such assignment was advertised in the newspaper, and the goods were afterwards sold by the trustees at public auction, and the plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some, but left the greater part in her possession: Held that such purchase by the plaintiff would protect the

goods against a judgment afterwards obtained and execution levied by a creditor of the husband, who had notice of the assignment at the time; although the plaintiff permitted his mother to continue in possession: and therefore he was entitled to recover them from the sheriff.

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and *Collins*, who resided a few miles off, was also informed of it, and then said he would consider, whether he would come in under the deed or not. On the 12th of *February* the stock in trade was sold by auction on behalf of the trustees; when the plaintiff, in order to accommodate his mother, became the purchaser of the household goods; which were fairly appraised to him, and he paid the price of them, and in a few days afterwards removed some articles, but suffered the greater part to remain in the house with his mother, who continued to reside there and take in lodgers as before; and at the ensuing *Michaelmas* he also took the house of the landlord at an advanced rent. The execution was levied in the *December* following; when the plaintiff gave notice to the sheriff that the goods were his property under the appraisement and sale; which was the first time that *Collins* was apprised of that circumstance. The learned Judge left it to the jury to consider, 1st, whether the change of property by the assignment and subsequent sale made to the plaintiff was notorious at *Perthore*; upon which the jury found in the affirmative: and 2dly, whether the assignment had been executed with an intent to defeat either the general body of creditors or any particular creditor. The jury found in the negative; whereupon a verdict was entered for the plaintiff.

Jervis moved to set aside the verdict, and enter a nonsuit, on the ground that it was improperly left to the jury to say, whether the change of property was notorious, there being no evidence of any change of property at all; inasmuch as *Clee's* wife was suffered to continue in possession of the goods after the assignment to the trustees, and after the sale to the plaintiff, precisely in the same manner as before.

No

No exclusive possession had been taken by the trustees under the deed ; for the person who was sent in two or three days after, was acting as well for the landlord as for the trustees ; and although the assignment was made public to the world, yet, if the party assigning still continues in possession, it is fraudulent. In like manner, after the sale to the plaintiff the possession remained as before ; and even supposing the sale to him to have amounted to a change of property, it could only operate as a gift to the mother, and then the property would pass to the husband and be liable to his debts. [*Le Blanc* J. 'There was no evidence that it was a gift. *Bayley* J. It was not put at the trial as a gift ; the only question made was whether the property passed.]

LORD ELLENBOROUGH C. J. I think the verdict is according to the law and the facts, as they appeared before the jury. 'To be sure the evidence was strong to repel the presumption of its being a gift to the mother, supposing that point had been made at the trial ; for such a presumption would have defeated the very object for which the purchase was made, by vesting the property in the husband, and thereby rendering it subject to his debts. As to the point respecting the change of property ; what was done respecting it was not done secretly, but the trust-deed was known and advertised in the public papers ; and the sale under it was by public auction. The trustees, indeed, for a time, allow the wife to continue in possession after the assignment ; and do not themselves interfere with the goods by removing them, except on occasion of the man's coming in and taking away the law ; which, however, is a circumstance in the case, although I do not much rely upon it :

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it : but when the sale took place, the plaintiff removed a part of the goods, and the rest only he suffered to remain with his mother for her accommodation. At all events an effectual change took place in *September*, when the house was retaken by the plaintiff, at an advanced rent ; but it seems to me there was a *bonâ fide* change before that time : to hold otherwise would be to pronounce that a person could not make a *bonâ fide* purchase of goods in the possession of another for his accommodation, and for the purpose of continuing them in the same possession.

LE BLANC J. *Clee* absconded, and never returned except on *Sundays*. The plaintiff purchased for the benefit of his mother. It does not therefore strike me that if the question had been raised at the trial, the jury would have found it a gift to the mother ; because the transaction was intended to protect the goods for her use, and not to subject them to the incumbrances of the husband. As to the change of possession ; part of the goods sold to the plaintiff was removed by him, and he afterwards took the house of the landlord at an advanced rent. Under these circumstances it appears to me that the deed was not fraudulent as against the creditor who had notice.

BAYLEY J. The possession did not give to *Clee* any false credit in the neighbourhood. The transaction as to the assignment was perfectly notorious, and *Collins* had notice of it ; and I think it is impossible to say that the possession of the goods was left with the mother in such a way as to be fraudulent on the part of the plaintiff. It was notorious in the neighbourhood that a
part

part of the goods was sold to the plaintiff, and some of them removed, and that the rest were only left in the possession of the mother for her accommodation.

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Rule refused (a).

(a) See 2 *Bos. & Pull.* 59., *Kidd v. Rawlings*.

THOMAS BIGNOLD and JOHN COCKSEGE BIGNOLD against WILLIAM WATERHOUSE, JOHN WATERHOUSE, SAMUEL WATERHOUSE, JOHN WATSON, and THOMAS COLDWELL.

Trinity,
May 6th.

CASE against the defendants, proprietors of the *Norwich* coach, for the loss of a parcel containing bank notes and bills delivered to the defendants to be carried from *Norwich* to *London*, and there delivered to Messrs. *Frazer* and Co., bankers.

At the trial before *Bayley* J., at the *London* sittings, after last *Michaelmas* term, it appeared that the plaintiffs were bankers residing at *Norwich*, and the defendants proprietors of the mail coach from *Norwich* to *London*. Early in the year 1810, a person who was one of the proprietors of another coach, called the old *Norwich* coach, intending to relinquish a part of his interest in that concern, and having promised the refusal to the plaintiff *T. Bignold*, the defendant *Coldwell* proposed to *T. Bignold* that if he would give up his claim to that promise, his own family and private parcels should go free by the mail coach; to which proposal *T. Bignold* after some time acceded. From that time parcels were

where it was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff free of expence, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, and is entered and paid for, &c. Held, that the defendants were

not liable for the loss of a parcel of above the value of 5*l.*, sent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants.

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sent two or three times a week by the plaintiffs to their correspondents in *London*, free of expence, except for booking and portorage ; upon which parcels the plaintiffs usually wrote the word “ banking ; ” but it being suggested by *Coldwell* that it might operate as a temptation, and occasion the loss of the parcels, it was omitted, and the word “ carriage ” was written instead ; to which *Coldwell* who was the book-keeper at *Norwich*, or his son, generally added the word “ free,” and subscribed their initials. On the 3d of *Jan.* 1812, the parcel in question, addressed to *Frazer* and Co., *Cornhill, London*, marked “ carriage,” and containing bills and notes to a considerable amount, was taken to the coach office in *Norwich*, by one of the plaintiffs’ clerks, who delivered it to *Coldwell*, and paid for the booking. It was put into the coach by a servant of the defendants, and arrived safe in *London* ; but was lost out of the cart by the boy who was employed to carry it from the inn in *London*, to the bankers. The usual notice given by carriers was affixed in the defendants’ coach office at *Norwich*, viz., that they would not be accountable for any parcel above the value of 5*l.*, unless the same was entered and paid for accordingly. At the time of the delivery of the parcel in question *Wm. Waterhouse* lived in *London*, *John Waterhouse* at *Ipswich*, and *Watson* and *Coldwell* at *Norwich*. No charge had ever been made for the banking parcels ; but *T. Bignold*, who was secretary to the *Norwich* fire and life insurance offices, had frequently sent insurance parcels by this coach, and these had been regularly charged. The learned Judge was of opinion that under the terms of the notice published by the defendants, it was incumbent on the plaintiffs to have entered the parcel in question with the

defendants

defendants as a parcel above the value of 5*l.*; for that even admitting the evidence proved that the defendants had agreed to carry this parcel gratuitously, so as to exempt the plaintiffs from paying for it as a parcel above that value, still the defendants were entitled to have had notice of its value, in order that their attention might be called to it more particularly; and that there were not any circumstances in the case, from which it must be necessarily implied that they had notice that it was a parcel of value. On these grounds he directed a nonsuit.

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In *Hilary* term *Park* obtained a rule nisi for setting aside the nonsuit, upon the ground that the notice required by the defendants did not apply in any respect to a gratuitous conveyance; and if it did, that it must be inferred as well from the mode in which these parcels had been conveyed, as from the substitution of the word "carriage" for "banking," at the suggestion of the defendants, that they had notice of the value.

The Attorney-General and *Abbott* now shewed cause, and contended that this was only a personal agreement with *Coldwell*, made behind the backs of the other defendants, for his individual benefit, and would not bind those who were not privy to it. The defendants therefore, with respect to this parcel, were to be considered as standing in the same situation as they stand with respect to all other parcels delivered to them in the ordinary course of their business; and consequently were exempted from liability by the express terms of their notice, the parcel not having been paid for as above the value of 5*l.* But admitting the agreement to be

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binding on all the defendants, still it is only an agreement to receive and carry the parcels free of expence ; but not to wave the benefit of notice of their value : if it were to be construed to such an extent it would make the liability arising from an agreement to carry without reward greater than where a reward is to be taken, which would be contrary to the doctrine held in *Coggs v. Bernard* (a).

Park and Peake, contra. The agreement with *Coldwell* must be presumed to have been communicated to and adopted by all the defendants, from the circumstance of the banking parcels having been uniformly carried free for two years ; and there can be no doubt that if that had been made a question at the trial, the jury would have so found. Perhaps also from the same circumstance coupled with that of the alteration made in the indorsement of the parcels, they might have inferred that the defendants had notice of the value, supposing any notice to have been necessary. But none whatever was necessary ; because the notice required by the defendants, as published at their office, was meant only to apply to parcels delivered to them for carriage in the usual course of their trade, and not under a special agreement like the present : and as the requiring such notices has always been considered as a special exception to the general liability of carriers, it ought not to be extended beyond the purpose for which it was intended. This case does not fall within the doctrine of *Coggs v. Bernard*, because this is not an agreement to carry without reward ; for although the reward was not paid at the time of the delivery of each parcel, still there was

(a) 2 *Ld. Raym.*, 917, 918.

a consideration for the agreement, which is equivalent to a reward.

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LORD ELLENBOROUGH C. J. It appears to me in this case that there was not any contract with the defendants, constituted in such manner as to bind more than one of them. There was indeed a contract, and a fraudulent one, between *T. Bignold* and *Coldwell*, which was unknown to the other defendants, to carry the family and private parcels of *Bignold* free of carriage, for a consideration moving to *Coldwell* alone. Without considering whether the parcel in question was within the description of family or private parcels, how can it be said that all the defendants undertook to carry this parcel safely and securely? It was delivered to the defendants for the purpose of carriage, but not for a reward to all the partners; but for a reward which was to be intercepted by one only. It is a general rule indeed that where several are concerned together in partnership, notice to one is equivalent to notice to all; but that rule presumes that the transaction is *bonâ fide*. Here, however, the case is different, the agreement is made with one of the defendants for his individual benefit alone, and the others are not parties concerned, not being made privy to the agreement. It was incumbent therefore on the plaintiffs to shew that notice was given to the other partners. I do not rely on the argument that this was a bailment for the conveyance of the parcel without reward, and therefore the bailee responsible only for personal negligence; but the ground I take is this, that there was no contract at all between the plaintiffs and the defendants: in which case *non oritur actio*. This decision will not be
conclusive

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conclusive against the plaintiffs if they can shape their action in any other form.

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GROSE J. agreed.

LE BLANC J. I think in every view of this case the action is not maintainable. The defendants are proprietors of a coach, and had given the usual notice that they would not be accountable for the loss of any parcel of above the value of 5*l.*, unless entered and paid for accordingly. On the general rule therefore they would not be liable unless they had notice of the value. But it is said that this case is taken out of the general rule by the particular circumstances. Those circumstances are, that in 1810 an agreement was entered into between *T. Bignold* and *Coldwell*, one of the proprietors of this coach, by which, in consideration of *Bignold's* transferring to *Coldwell* his right to a share in another concern, the latter agreed to carry his (*Bignold's*) family and private parcels free of expence. There was no consideration subsisting between *Bignold* and the other proprietors, but only between *Bignold* and *Coldwell*. Then if we consider what was to be carried under the terms of this agreement. They were to be family and private parcels; but this parcel is neither one nor the other; and therefore not within the terms of the agreement, even supposing *Coldwell* to represent all the proprietors. But it is said that as parcels of this description had been carried free for two years, therefore it must be inferred that all the partners knew of it and acquiesced. But it appears that during that time *Coldwell* was book-keeper, and the parcels were transmitted by him, and
he

he was acting for his own benefit without communicating with the others. In every view of the case therefore I think there is no reason for disturbing the nonsuit.

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BAYLEY J. The object of requiring notice in these cases is twofold; first, to obtain a larger premium for the conveyance of valuable parcels; and secondly, to put the proprietors on their guard; and therefore I think that where such notice as the present is required to be given, even in a case where a carrier undertakes to convey goods without reward, if the goods exceed the value limited, notice ought to be given, in order to direct his attention to the particular goods; for he does not dispense with notice in toto, but only with payment. Here there was no evidence that any notice had been given as to this being a parcel of value. If I had been desired to leave it to the jury whether the defendants knew this to be of value, I should certainly have left that question to them.

Rule discharged.

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Thursday,
May 6th.

The KING *against* The Collector and Comptroller
of the Customs in LONDON.

The purchaser of a ship which appears by the sentence of condemnation in the vice-admiralty court abroad to have been taken and condemned for being engaged in the slave trade, is not entitled to register such ship at the custom-house under the 26 G. 3. c. 60., as the owner of a ship taken and condemned as lawful prize, although he produce a certificate from the Judge of the court abroad certifying that the ship was condemned as lawful prize.

THIS came on upon a rule nisi obtained in the last term for a mandamus to the collector and comptroller of the customs, commanding them to register the ship *Merced*, and to grant a certificate of such registry, pursuant to the stat. 26 G. 3. c. 60. (a). The rule was obtained on behalf of the purchasers of the said ship, who, it was contended, had exhibited at the custom-house the proper documents required by the act to entitle them to registry. The document upon which the question turned was a certificate from the judge of the vice-admiralty court at *Sierra Leone*, certifying, “ that it appeared by the records of the said court that
“ the ship *Merced* was condemned in the said court as
“ good and lawful prize to our sovereign lord the king,
“ seized and taken by his majesty’s garrison at *Senegal*.” To obviate the effect of this certificate, a copy of the decretal part of the sentence of condemnation, transmitted by the registrar of the court at *Sierra Leone* to the

(a) By *f. 3.* it is enacted, that all and every ship and vessel having a deck, or being of the burthen of 15 tons or upwards, belonging to any of his majesty’s subjects, &c shall be registered in manner therein-after mentioned, and that the person or persons claiming property therein shall cause the same to be registered, and shall obtain a certificate of such registry from the collector and comptroller of his majesty’s customs, &c.: and by *f. 25.* it is further enacted, that the owner or owners of all such ships or vessels as shall be taken by any of his majesty’s ships or vessels of war, or by any private or other ship or vessel, and condemned as *lawful prize* in any court of admiralty, shall upon registering such ship or vessel before he or they shall obtain such certificate, produce to the proper officer of his majesty’s customs a certificate of the condemnation of such ship or vessel under the hand and seal of the Judge of the court in which such ship or vessel shall have been condemned, &c.

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registrar of the high court of admiralty, was set forth in an affidavit in answer to the rule, (and it was admitted on the other side that it was a true copy of that part of the sentence,) which recited “ that the said ship was at “ the time of the seizure thereof on the high seas un- “ lawfully equipt and refitted, as had been set forth “ against her by the claimant,” and proceeded “ there- “ fore to pronounce, decree, and declare that the said “ ship, her boats, guns, tackle, apparel, and furniture, “ were rightly and duly taken and seized, and that the “ said ship was at the time of the seizure thereof on the “ high seas, as far as appears to the Court, illegally “ equipt or refitted, in that the said ship being fitted “ out, manned, and employed for the prosecuting or “ carrying on the *African* slave trade, did procure and “ receive from a subject of his majesty resident at “ *Goree*, certain goods, wares, or merchandize, fit and “ necessary to the prosecuting and carrying on the said “ trade, against the form of the statutes in that case “ made and provided; and that the said ship being so “ unlawfully equipt and refitted as such, ought to be “ accounted and reputed liable to confiscation, and to “ be adjudged and condemned as good and lawful prize “ to our lord the king; and that the said ship, her boats, “ guns, tackle, apparel, and furniture, be adjudged and “ condemned as good and lawful prize to our lord the “ king, seized and taken by his majesty’s garrison of “ *Senegal*,” &c.

The Attorney-General and *Dampier* shewed cause against the rule, and contended that the Court ought not to interfere in a case where, notwithstanding the certificate of the Judge of the vice-admiralty court abroad, certify-

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ing that the ship was condemned as lawful prize, it appeared from the sentence of condemnation itself that she was condemned on account of a breach of the laws prohibiting the slave trade; which made her liable to *confiscation* (a), and not properly the object of condemnation as *prize* within the meaning of the registry acts. The vice-admiralty court abroad cannot, by introducing an incorrect term into their certificate, convert that which is only a confiscation into a condemnation as prize; and if so, this certificate, when it comes to be explained by the sentence, amounts to no more than a confiscation. The parties, therefore, applying for this mandamus have not and are not in a condition to produce the proper document required by the act to entitle them to demand registry.

Park and *Brougham*, contra, maintained, 1st, that the collector and comptroller of the customs acted ministerially and not judicially in granting registry, and therefore could not look beyond the terms of the certificate into other documents in order to judge of its legal effect. But, 2dly, supposing they could, they were not right in refusing registration in this case; because the parties applying had produced such a document as satisfied the meaning of the registry acts. The several acts which relate to the registry of ships taken and condemned (b), do indeed speak of them as *prize* ships; but that expression is not necessarily to be taken in its strict sense to mean prize of war only, but may also mean all such seizures as are made upon good cause of condemnation.

(a) 46 G. 3. c. 52.

(b) 26 G. 3. c. 60. s. 25. 43 G. 3. c. 160. s. 42. 45 G. 3. c. 72. s. 29.

And this construction seems favoured by 26 G. 3. c. 60. §. 25. (upon which this application is founded), which speaks of "all such ships as shall be taken by any of his majesty's ships of war, or by any private or other ship," not adding *ship of war*, which must be intended therefore to comprehend other than mere hostile captures. And a subject of a friendly power may be guilty of such acts of trading as to become liable to a seizure and condemnation of his property as prize in a general sense, and yet not as prize of war (a). Every prize therefore is not necessarily prize of war; and the true construction of the word prize in these acts seems to be this, that it extends to all ships condemned as such by the prize courts. But even if it is to be taken in its strict sense, it may be inferred from what fell from Sir *W. Grant* in the case of the *Amedie* (b), where he held the trading in slaves as *primâ facie* an offence against the law of nations, that in the court of appeals at least this would be considered as a hostile capture. At all events the parties making this application are the innocent purchasers under a condemnation as prize, and therefore entitled to the most favourable construction.

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LORD ELLENBOROUGH C. J. If the trading in slaves be an offence against the law of nations, it does not therefore follow that it is an offence that would make the vessel subject to hostile capture. It would not of itself convert the trader into an enemy; and therefore the authority of the case cited does not govern the present. The authority given by the statute to register ships taken and condemned, extends only to ships taken and con-

(a) 1 Rob. Adm. R. 210. Case of the *Eenigheid*. 4 Ib. 251. *The Naysade*.

(b) 1 Allon's R. 251.

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demned as lawful prize. I have no conception at présent that the statute meant to include any other than prize of war; but if it were doubtful whether its provisions should be extended to condemnations incurred on account of the violation of a great political law of the state, I am sure that the Court would expect the parties who call for its extraordinary interposition, and upon whom the onus lies, to remove those doubts before they acceded to the application. As the case now stands, the certificate appears to have been irregularly granted; and the question is whether we are to act upon a document so granted. We cannot reason as to what it might have been expedient for the legislature to enact; they might, if it had seemed good to them, have allowed all ships, for whatever cause they were condemned, after purchase by a *British* subject, to have the benefit of registration; but they have not so enacted, but have limited the registry to ships condemned as prize; and it does not become me to say that where a limited authority is given by the legislature, that authority may be extended: and I think that to grant this rule would in effect be extending that authority.

GROSE J. The words condemned as lawful prize apply only to vessels taken *jure belli*, and not as in this case to a vessel condemned for violating the provisions of an act of parliament.

LE BLANC J. The question is whether upon the disclosure now made, from the papers before the Court, of the real nature of the transaction, we are authorised to grant a mandamus to the collector and comptroller of the customs to register this ship. The act says that

“ no

“no ship or vessel foreign built (except such ships or vessels as have been or shall hereafter be taken by any of his majesty’s ships or vessels of war, or by any private or other ship or vessel, and condemned as lawful prize in any court of admiralty,) shall be entitled to the privileges of a *British* ship,” &c. It is in this respect a restraining not an enlarging statute; and the question is whether this ship be within the exception. Now it appears by the sentence that she was taken as being employed in carrying on the *African* slave trade, in violation of the laws of this country, and condemned on that account. But it is said that by the certificate of condemnation required by *§. 25.* it appears she was condemned as lawful prize, and that is sufficient. But the act does not make the certificate of the Judge final and complete evidence of the cause of condemnation of the ship; and if this Court see that she was condemned for a breach of a revenue law, they will not give such a conclusive effect to the certificate as to shut out from their view the real cause of her condemnation: and I believe it has not yet been decided that a ship, for violating a revenue law, is the object of condemnation as lawful prize. This ship therefore is clearly not brought within the exception in the registry act, and we should be doing injustice in compelling the commissioners to grant registry.

Per Curiam,

Rule discharged.

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*Thursday,
May 6th.*

The KING, on the Prosecution of Sir ARTHUR
CHICHESTER, *against* INCLEDON.

The prosecutor of an indictment for obstructing a highway, must shew himself to be the party grieved in order to obtain costs under the 5 & 6 W. & M. c. 11. f. 3.; therefore where the prosecutor did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and whilst it was stopped declared he did not care about it: held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expence.

IN *April* 1809 the defendant was indicted at the quarter sessions for the county of *Devon* for obstructing a public road, which indictment was removed by certiorari at his instance, and tried at the *Lent* assizes 1810, and a verdict found for the crown. Judgment was given in the following *Michaelmas* term, and the defendant fined 6s. 8d. and his recognizance discharged. In *Michaelmas* term last a side bar rule having been obtained for taxing the costs to be paid by the defendant to the prosecutor; *Harris* in the following term obtained a rule nisi for discharging that rule, on the ground that Sir *A. Chichester* was neither the prosecutor nor party grieved within the meaning of stat. 5 & 6 W. & M. c. 11. f. 3.; in support of which the affidavits stated, that the defendant about 18 years ago, at which time Sir *A. Chichester* was an infant, purchased the property through which the road in question passed, which had been shut up ever since the purchase until the indictment was preferred. That before that time Sir *A. Chichester* never used the road in question. That on the death of Sir *John Chichester*, his immediate ancestor, in *Sept.* 1808, a short time before the indictment was preferred, Sir *Arthur* became possessed of his property. Application was then made by his steward to the defendant to open the road, which he declined doing, until the right was tried; in the mean time, however, he gave permission to Sir *Arthur* or his servants to pass through that part of his estate. That in a conversation between Sir *Arthur* and the defendant, he told the defendant that he knew nothing about the road; that he

was a young man just come to his estate; that his attorney had told him he had a right to the road, and that he ought to maintain his right, but as to himself he did not care about it. That since the road had been declared to be a public road and thrown open, neither Sir *Arthur* nor his servants had ever used it; and that it never could have been advantageous to him to use it, as there were better and more commodious roads for the enjoyment of his estate. It was stated also, that soon after Sir *Arthur* came to his estate an auction was held for the sale of some timber in the woods belonging to him: that one of the conditions of sale was, that the timber should be conveyed over the road in question; but several of the bidders declared that as there were other more commodious and convenient roads than that, they would not bid at such auction until that condition was withdrawn. It was also sworn, that the opening this road would probably be detrimental to the estate of Sir *Arthur*, by subjecting the same to considerable trespasses. The name of Sir *A. C.* did not appear on the back of the indictment. The rule was opposed upon the following grounds as disclosed by affidavit: that for several years previous to the obstruction by the defendant the road in question had been used as a public road; that it was more convenient than the other roads from Sir *A. Chichester's* woods, being nearly on level ground, whereas the other roads passed over high and steep hills. It was admitted, however, that the road had not been used since it was thrown open, in consequence of the prosecution; but that was accounted for by its not being in a proper state of repair. It was further stated, that on the 20th of *March* 1809 several persons were employed in conveying materials to repair a weir of Sir *Arthur*, and that they were obliged

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to go a circuitous route in consequence of the obstruction in this road ; whereby Sir *Arthur* was put to an additional expence, the workmen being paid by the day. The attorney for Sir *Arthur* swore that the defendant had been indicted at the sole instance and expence of Sir *Arthur* ; but there was not any affidavit by Sir *Arthur* himself.

Casberd, who shewed cause, contended that it sufficiently appeared under these circumstances that Sir *A. Chichester* was both prosecutor and party grieved, so as to entitle him to the costs. With respect to his being the prosecutor, it appears that the prosecution was carried on at his instance and expence ; and the circumstance of his name not appearing on the back of the indictment will not prevent his being so considered, according to the opinion of *Buller J.* in *Rex v. Sharpness (a)*. As to his being the party grieved, that was shewn by his being obliged to take a circuitous route and incur additional expence in consequence of the obstruction (*b*).

Jekyll and *Harris* contra, did not rely on the name not appearing on the back of the indictment ; but contended that after a lapse of two years from the time when judgment was pronounced and the recognizance of the defendant discharged, the party who came to the court for costs was bound to shew himself clearly within the statute. That has not been done in this instance ; for it is only left to be inferred that he is the prosecutor from the prosecution having been instituted at his instance and expence : and even that fact is not sworn to by the party

(a) 2 T. R. 48.

(b) 7 T. R. 32. *Rex v. Williamson*.

himself, which it ought to have been, but by his attorney only. Then there is no peculiar grievance stated as arising to him any more than to any other individual who might chance to be prevented going that way, viz. that he was obliged to go another. Besides, there is no case where the Court has allowed costs after the recognizance has been discharged; and in *Rex v. Sharpness*, Buller J. said that this act of parliament had always been construed as strictly as possible.

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LORD ELLENBOROUGH C. J. The question is, whether Sir *A. Chichester* is the prosecutor of this indictment; and if so, whether he is the party grieved. Under the circumstances of this case, considering that he was a minor when the obstruction first commenced, that his name was not on the back of the indictment, and that he was only so far a party to the prosecution inasmuch as he defrayed the expences; considering also that the application for costs has been delayed for two years beyond the time when it would more properly have come before us, it might have been fitting that Sir *A. Chichester* should have come forward himself and deposed to the fact of his being the prosecutor; although I own the inclination of my opinion upon this point is, that he stood in the situation of prosecutor. But then the question still remains, whether he is the party grieved. The endeavour of Sir *A. Chichester* to have the timber conveyed along the road in question, was rather the act of a party grieving than of one aggrieved; for it appears not to have been approved of by any of the bidders, and was probably planned with a different view than that of their accommodation. I admit indeed that with respect to the public there has been an usurpation by the defendant; but that is not
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enough to constitute a prosecutor the party grieved ; there must be also some special and peculiar injury accruing to him from the obstruction, besides that which affects all the subjects in common with him. The act of parliament applies as well to indictments for riots, forcible entry, assault and battery, and other misdemeanors, as to an indictment in this form ; in many of which the offence itself is of a personal and private nature, although in its consequences it concerns the public, and is therefore the object of public prosecution. In those cases the offence itself designates the party grieved ; but in this there is nothing in its nature which presses more upon one individual than another. Then looking to these affidavits, I am anxious to find some peculiar grievance stated prior to the indictment to satisfy me that the party is within the meaning of this act the party grieved ; but I am unable so to find : and the prosecutor seems for a long time to have so considered it ; for he lies by for two years after the judgment pronounced before he makes this application. Under these circumstances therefore I think the Court exercises a sound discretion in directing that the rule for discharging the side bar rule must be made absolute.

GROSE J. It does not appear from the affidavits that Sir *A. Chichester* ever considered himself the party grieved originally ; what the attorney might have done I cannot say. The case is not brought within the act of parliament.

Per Curiam,

Rule absolute (a).

(a) See 16 *East*, 194. *R. v. Dewnap*.

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The KING *against* CREEVEY, Esq. M. P.Friday,
May 7th.

THE defendant was tried at the last assizes for the county palatine of *Lancaster*, before *Le Blanc J.*, for a libel against *Robert Kirkpatrick*. The indictment charged that the defendant intending to excite discontent and disaffection in the liege subjects against the administration of the government in the collection of the revenue, and to traduce and vilify *Kirkpatrick*, being an inspector general of taxes at *Liverpool*, appointed under 48 G. 3. c. 141. and to bring him into hatred, &c. in the execution of his duty as such inspector, &c. did print and publish a malicious libel of and concerning him being such inspector, and his conduct in the execution of his office, in the form of a report of a speech purporting to have been made by the defendant in the House of Commons, containing, amongst other things, &c. The libel was then set forth, and imputed to *Kirkpatrick* that he was to be an informer or accuser against his neighbours and fellow townsmen, for having their lands assessed below their real value; and that a great annuity was to be his recompence, for undertaking to screw up their assessments to the extent of his own imagination; and that this had been carried into effect. At the trial it appeared that the passages which constituted the subject of the charge, were contained in a speech delivered by the defendant, who was a member of the House of Commons, in his place in that House upon a debate respecting the *East India Company's* affairs. An incorrect report of what he had there said having appeared in the *Liverpool* and other newspapers, the defendant sent what was admitted by the counsel for the prosecution

A member of the House of Commons may be convicted upon an indictment for a libel in publishing in a newspaper the report of a speech delivered by him in that House, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers.

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to be a correct report of his speech, to the editor of the *Liverpool* paper, with a request that he would publish it in his newspaper; which he accordingly did. Upon this evidence the counsel for the defendant submitted to the learned Judge that there was no question to go to the jury. 1st, There was not any proof of malice so as to constitute the publication libellous on that account: and, 2dly, as privilege of speech in parliament was allowed to every member of parliament; in like manner also he was privileged in publishing a correct account of his speech in parliament. The learned Judge was of opinion that it was not necessary to prove malice, but it might be inferred from the publication itself: and upon the authority of the case of *Rex v. Lord Abingdon* (a) he held that a member of parliament is answerable for publishing what he has delivered as his speech in parliament, if it contain defamatory matter; and that question he left to the jury, stating to them that they were to look both to the matter and manner of the publication in order to decide whether it was libellous or not. The jury found the defendant guilty.

Brougham moved for a new trial on the ground of a misdirection of the learned Judge. He contended that *Rex v. Lord Abingdon* had been supposed to carry the law farther than it really did. In that case, according to a MS. note which had been furnished him of what passed at the trial, and which in some respects was more full than what appeared by the report, it was proved that the prosecutor was the defendant's attorney, and that the defendant having had a quarrel with him went to the House

(a) 1 Esp. N. P. C. 226.

of Lords, accused him of unprofessional and dishonest practices, and in order to have a handle for publishing the libel, gave notice of his intention to introduce a bill into parliament; and afterwards published the libel at his own expence. That case therefore afforded strong evidence to shew that the whole was founded in malice; and to justify what Lord *Kenyon* C. J. said, that a member of parliament had no right to make his speech a vehicle of slander; and thus the publisher might well be held responsible in that case, and yet not in the present: for his Lordship emphatically added, that in order to constitute a libel the mind must be in fault, and shew a malicious intent to defame. Now here, there is not only no proof of any malicious intent, but the inference also is rebutted by the occasion of the publication; which was not made a vehicle of slander, but was for a bonâ fide purpose of correcting misrepresentation touching a matter which had passed in parliament; and therefore although it may incidentally contain reflections against an individual, the publisher is not responsible. In *Lake v. King* (a) it was held, that an action would not lie for printing a petition to parliament and delivering it to the members, it being agreeable to the course and proceedings in parliament: and in *Rex v. Wright* (b), (which occurred some years after *Rex v. Lord Abingdon*,) a criminal information was refused for publishing the report of a select committee of the House of Commons, which contained a paragraph charging an individual with having views hostile to the government: and the Court refused it on this ground, viz. that the publication was a true copy of the report, which was a proceeding in parliament; and Lord *Kenyon* C. J.

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(a) 1 *Saund.* 131.(b) 8 *T. R.* 293.

said,

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said, that it was impossible to admit, what was assumed as the foundation of that application, that the proceedings of either house of parliament were libellous. And *Lawrence J.* adverted to the distinction in *Waterfield v. Bishop of Chichester* (a), that the charge there was that the plaintiff had not published a true account; and that the Court declared such false account a libel: and he alluded also to *Curry v. Walter* (b), where *Eyre C. J.* held that the publishing in a newspaper a speech delivered by a counsel upon a motion made in this court was not a libel; it being a true account of what passed in a court of justice: and *Lawrence J.* added, that although the publication of such proceedings might be disadvantageous to the individual concerned, yet it was of vast importance to the public that they should be known. The same reasons (as was said) apply also to proceedings in parliament: indeed, according to 4 *Inst.* 23., recognized by *Bayley J.* in *Burdett v. Abbot* (c), the House of Commons is a court of judicature. The case therefore of *Rex v. Wright* is decisive of the present: there is only this difference, that there it was a publication of the report of a committee of the House of Commons; here it is that of the speech of a member of that House; but both are equally proceedings of that House: and it was held in that case that to publish a correct account of such proceedings is not libellous. Only it must be further observed in favour of the defendant in this case, that he had an interest in the publication which the defendant in *Rex v. Wright* had not; and which also distinguishes it from *Rex v. Lord Abingdon*: for he had an interest as a mem-

(a) 2 *Mod.* 118.(b) 1 *Esf. & Pull.* 525.(c) 14 *Esf.* 159.

ber of the House of Commons, the representative body, in defending himself before his constituents against misrepresentation; and as he serves for the whole realm when he is returned to parliament, and not merely for the body of electors who return him (*a*), such defence of himself may be as general. And in the Commons journals (*b*) will be found many resolutions against printers and newspapers publishing the speeches of members or reports of committees in that House, but none against a member himself so doing. The general rule then to be collected from these and other cases which are analogous (*c*) seems to be this, that although the publication of a matter may be injurious to the character of an individual; yet it done *bonâ fide*, by a party who has an interest in the matter; or who is warranted by the occasion; in either case it will be justified. Here both those circumstances concurred to justify the defendant.

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Lord ELLENBOROUGH C. J. If any doubt belonged to this question, I should be most anxious to grant a rule to shew cause, in order to have the grounds of doubt more fully discussed and settled. But as I cannot find any thing on which to found even a color for argument, except what arises from an extravagant construction put on a particular expression of Lord *Kenyon* in the case of *Rex v. Wright*, it would be to excite doubts, and not to settle them, if we were to grant the rule. What Lord *Kenyon* there said was this, "That it was impossible to admit that the proceeding of either of the Houses of parliament

(*a*) 4 *Inst.* 14. 1 *B. Comm.* 159.

(*b*) 6 *Feb.* 1640. 11 *Feb.* 1695. 23 *Jan.* 1722. 26 *Feb.* 1728.
13 *Apr.* 1738.

(*c*) 4 *Esp. N. P. C.* 191. *Delany v. Jones.* 1 *T. R.* 111. *Weatherston v. Hawkins.*

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was a libel; and yet that was to be taken as the foundation of the application made in that case." I will not here wait to consider whether that could be strictly called a proceeding in parliament. What was printed for the use of the members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious tendency to the character of an individual, was legitimate and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in parliament in the terms given to some of the judges in that case. But it is not necessary to say whether that be so or not; because this does not range itself within the principle of that case. How can this be considered as a proceeding of the Commons house of parliament? A member of that house has spoken what he thought material, and what he was at liberty to speak in his character as a member of that house. So far he was privileged: but he has not stopped there; but unauthorized by the house, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual. The only question is whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public; and to address them as an oratio ad populum in order to explain his conduct to his constituents? There is no case in practice, nor I believe any proposition laid down by the best text writers upon the subject, that tends to such a conclusion. The case of *Rex v. Wright* indeed determined that a proceeding in parliament could not be deemed libellous; but that does not warrant a publication of it in every newspaper, as

was held in *Rex v. Lord Abingdon*. As to *Curry v. Walter*, it is not necessary for the present purpose to discuss that case: whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations; and shall never fully assent to the unqualified terms attributed in the report of that case to *Eyre C. J.* In the present case the question was left to the jury whether the publication was libellous, taking into their consideration all the circumstances; and nothing was subtracted from their consideration. The jury have found that it was; and I can see no ground for drawing the subject again into discussion, in order to excite doubts which do not at present exist. In *Lake v. King* the judgment of Lord *Hale* and of the other Judges was founded upon this point, viz. that it was the order and course of proceedings in parliament to print and deliver copies, of which the Court ought to take judicial notice. In order therefore to bring this case within the rule in *Lake v. King*, we ought to find that it is the order and course of proceedings in parliament, that members should print their own speeches; and that this Court will take judicial notice of such a course of proceeding. The very statement of the proposition shews it to be untenable. It is therefore neither within *Lake v. King* nor *Rex v. Wright*, giving to that case its fullest effect; and even if it were, perhaps the Court would lay down the doctrine with somewhat more limitation than is to be found in that case.

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GROSE J. I am not disposed to find any fault either with the direction of the learned Judge or the finding of the jury. In *Rex v. Lord Abingdon* the same arguments which have been addressed to the Court to-day were

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fully considered by Lord *Kenyon*. It was competent to the jury to find the defendant guilty, if upon consideration of all the circumstances, they deemed the publication malicious.

BAYLEY J. If the case admitted of any doubt I should be desirous of granting a rule. But the case is without difficulty. A member of parliament has undoubtedly the privilege for the purpose of producing parliamentary effect to speak in parliament boldly and clearly what he thinks conducive to that end. He may even for that purpose, if he thinks it right, cast imputations in parliament against the character of any individual; and still he will be protected. But if he is to be at liberty to circulate those imputations elsewhere, the evil would be very extensive. No member therefore is at liberty so to do. In *Lake v. King* such was the impression of the lawyers of that day. There the defendant did not justify the printing and delivering the petition to divers subjects, &c. generally, but to divers subjects being members of the committee appointed by the Commons; and such publication was held justifiable, because it was according to the order of proceedings of parliament and their committees. But it is not contended to-day that it is according to the course and order of parliament for members to communicate their speeches to the printers of newspapers, in order to give them to the world in a more corrected form. If any misrepresentation respecting them should go forth, there is a course perfectly familiar to all members, by which such misrepresentation may be set right, viz. by complaining to the House of the misrepresentation, and having the author of it at the bar to answer to such complaint: therefore it is not necessary

necessary for the purpose of correcting the misrepresentation that a member should be the publisher of his own speech. It has been argued that the proceedings of courts of justice are open to publication. Against that as an unqualified proposition I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public by circulating that which for the purposes of justice the court is bound to hear? I should think not: and it is not true therefore that in all instances the proceedings of a court of justice may be published. Again it may be said that counsel have a right, in pursuance of their instructions, and whilst the cause is going on, to endeavour to produce an effect by making such observations on the credit and character of parties and their witnesses, as sometimes when the cause is over perhaps they are sorry for. But have they therefore, or any other person who hears them, a right afterwards to publish those observations. I have no hesitation in saying that when the occasion ceased, the right also would cease, and that it would be no justification to plead that such a publication was a transcript of the counsel's speech. So here I think the occasion did not justify the publication. The ground of the argument therefore fails, and I see no reason for disturbing the verdict.

LE BLANC J. As this indictment was tried before me, I was unwilling to give any opinion until I heard those of my Lord and my brethren: but now that I have so done, I desire to express my entire concurrence in those opinions. It has been correctly stated by the learned counsel, that at the trial I overruled the objection taken

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by way of answer to this indictment, viz. that this was a correct representation of the speech delivered by the defendant in parliament. I did over-rule it; and said that still it was a question for the jury whether the subject-matter was libellous. The learned counsel then addressed the jury, and I stated to them the view in which the case struck my mind, and told them that they were to consider whether the publication tended to defame the prosecutor; that I was of opinion it did; still, however, leaving the question to them. I further stated to them that where the publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances attending the publication to rebut that inference; and I left it to them to say whether the circumstances of this case did rebut that inference; adding, that in point of law, the circumstance of its being a publication of a speech delivered by a member of the House of Commons did not rebut it. As to the right of a member of parliament to speak in parliament what is defamatory to the character of another, that sitting in a court of justice we were not at liberty to inquire into that; because every member had privilege of speech in parliament: but when he published his speech to the world, it then became the subject of common law jurisdiction; and the circumstance of its being accurate, or intended to correct a misrepresentation, would not the less make him amenable to the common law in respect of the publication. If any thing had since occurred in the course of this argument to induce me to change the opinion I entertained and pronounced at the trial, I should have been open to conviction, and thought it right to send the case down again for farther consideration: but it is my duty, after I have heard what has fallen from

from the Court, to say that I still continue of the same opinion.

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Rule refused.

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The defendant was on a subsequent day in this term brought up to receive the judgment of the Court, and a fine imposed of 100*l*.

MORRIS *against* LORD COCHRANE:

Friday,
May 7th.

ACTION by the bailiff of *Westminster* against the defendant, one of the candidates at the last election of members to serve for that city in parliament, to recover the expences of the hustings. The defendant let judgment go by default. Upon the execution of the writ of inquiry, the plaintiff contended that he was entitled to recover against the defendant the whole amount of the expences, inasmuch as by 51 G. 3. c. 126. the candidates were made jointly liable; and therefore the defendant, not having pleaded in abatement that the other candidate should have been joined, was liable for the whole. The undersheriff ruled upon the construction of the act of parliament, that the defendant was only liable for a moiety of the expences; which the jury accordingly gave.

By stat. 51 G. 3. c. 126., one of two candidates for the city of *Westminster* is only liable to the bailiff for a moiety of the expences of the hustings.

Richardson moved to set aside the execution of the writ of inquiry, upon the ground that the undersheriff had misconstrued the act. The 51 G. 3. c. 126., after reciting the 18 G. 2. c. 18. touching the elections of knights of the shire, professes to make provision for defraying the expences of the hustings at *Westminster*, by

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extending to it the provisions of the recited act, and then it enacts, in conformity with that statute, that the bailiff shall erect hustings at the expence of the "candidate or candidates" generally: which words create a joint liability in the candidates. And it is observable that where the legislature intended to make the liability separate, it has so expressed it; as in 34 G. 3. c. 73. §. 6. (for erecting booths for administering the oaths,) the words are "the expences of which booths shall be defrayed by the candidates *in equal proportions*."

LORD ELLENBOROUGH C. J. There is no pretence for saying that the candidates are to be considered as jointly liable on account of their having a joint interest; for they are in point of interest the most adverse parties in the world. Then the question is whether the words of the act render them jointly liable. I think the act means only that the whole expences are to be defrayed amongst the candidates; and if so, they are liable in their several proportions.

Per Curiam,

Rule refused.

Saturday,
May 8th.

— against MOOR.

In an action of slander, imputing a specific charge of unnatural practices to plaintiff, where the declaration contains the usual allegation of good fame, &c., the defendant may, upon cross-examination, ask the plaintiff's witness whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, in order to diminish the damages.

ACTION for words imputing to the plaintiff unnatural practices. The declaration alleged in the usual form that the plaintiff was of good fame, &c., and had not ever been guilty, or until the time of committing the said grievance, by the defendant, been *suspected* to

have

have been guilty of the crimes, offences, and misconduct therein stated to have been laid to his charge, or any other such detestable crime; by means of which the plaintiff, before the committing the said grievance, had deservedly obtained the good opinion and credit of all his neighbours and other good subjects, to whom he was in any wise known. The declaration then set forth the words which imputed a specific charge of having committed the offence at the plaintiff's house, and concluded with alleging the usual gravamen, that by means thereof the plaintiff was greatly injured in his fame, inasmuch that divers of his neighbours have on occasion of the speaking and committing the grievances suspected and still do suspect him to be a person guilty of unnatural practices.

At the trial before *Grose J.*, at the last assizes for *Norfolk*, the witness who proved the words, was asked upon cross-examination, whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, to which question the plaintiff's counsel objected as not being admissible: but the learned Judge admitted it upon the authority of the *Earl of Leicester v. Walter (a)*, before *Mansfield C. J.*, and said that it was evidence to contradict the plaintiff's allegation that he was of good fame, and that the speaking of the words occasioned the injury to it. Upon this the plaintiff's counsel submitted to a nonsuit.

Sellon Serjt. moved to set it aside, on the ground that this evidence was improperly received, to contradict that which was matter of inducement only and immaterial,

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(a) 2 Camp. N.P. C. 251.

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and which the plaintiff was not bound to prove. [Lord *Ellenborough* C. J. The evidence was, I suppose, received in diminution of the damages, as in the case cited, and not in bar : but the plaintiff rather than encounter its effect chose to be nonsuited.] It was understood by the plaintiff that the evidence was admitted in bar to the action, and therefore he was nonsuited.

LORD ELLENBOROUGH C. J. It certainly must have been received in mitigation of damages only, for upon looking at the Earl of *Leicester v. Walter*, I find it was so received in that case. And certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished : and it is competent to shew that by evidence. But the plaintiff made his election to be nonsuited, instead of meeting the evidence : and this nonsuit is not a bar to another action. I think therefore a rule ought not to be granted.

GROSE J. I read the case of the Earl of *Leicester v. Walter*, at the trial, and meant to act in conformity with what *Mansfield* C. J. had ruled in that case. The plaintiff chose to be nonsuited.

BAYLEY J. It was certainly evidence in mitigation of damages.

Per Curiam,

Rule refused (a).

(a) In *Snowdon v. Smith*, *Devon Lent* assizes, 1811, which was an action against the defendant for saying " that he had heard that the plaintiff had been guilty of unnatural practices ;" to which the defendant pleaded a justification, that he had been so guilty with divers persons, naming them. *Chambre* J. would not permit the witness, who proved the words to be asked on cross-examination, whether reports concerning the plaintiff, such as the defendant stated he had heard, had not gone abroad. The case of the Earl of *Leicester v. Walter* was cited, but the learned Judge held that it did not govern the case then before him, where the defendant by his plea had put the issue upon the truth of the charge imputed.

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HALL *against* SMITH.Saturday,
May 8th.

ACTION for slander. The first count of the declaration stated that long before the time of speaking and publishing the words the plaintiff had been a woolstapler, to wit, at a certain town called *Cirencester*; and also before and at the time of speaking and publishing the words was, and thence hath been, and still is a brewer, and as such was acquiring great gains, to wit, at *Oxford*. That defendant intending to cause it to be suspected that the plaintiff had been a bankrupt and was a person in insolvent circumstances, spoke of and concerning the plaintiff as such trader as aforesaid, and of and concerning one *Brookes*, the following words, "Mr. Hall and Mr. *Brookes* have both been bankrupts, Mr. Hall at *Cirencester*," &c. The second count alleged the words to have been spoken of and concerning the plaintiff in his former trade of a woolstapler; and the third of and concerning the plaintiff in his trade of a brewer. At the trial before *Bayley J.*, at the last *Oxford* assizes, the plaintiff gave no evidence of his having been a woolstapler, but proved that he was a brewer at *Oxford*; and that the words spoken of him by the defendant were these: He was a bankrupt at *Cirencester*, in *Gloucestershire*, in the liquor trade, or wines or spirits. It was objected that this proof did not support the allegation that the words were spoken of the plaintiff in his trade of a brewer at *Oxford*. The learned Judge was of opinion that it was substantially proved; the gravamen being this, that the defendant said of the plaintiff, a brewer at *Oxford*,

Where the plaintiff declared that he had been a woolstapler at *Cirencester*, and was a brewer at *Oxford*, and that defendant spoke of him as such trader these words: "Mr. H. (the plaintiff) and B. have both been bankrupts, Mr. H. at *Cirencester*," and gave no evidence of his having been a woolstapler, but only that he was a brewer at *Oxford*, and proved the words spoken to have been these, He was a bankrupt at *Cirencester*, &c. Held that this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at *Oxford* may be a bankrupt at *Cirencester*.

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Oxford, that he was a bankrupt : but he gave the defendant liberty to move for a nonsuit.

Abbott accordingly moved upon this objection, contending that the words seemed to relate rather to his former trade at *Cirencester*, which was not proved, than to that of a brewer, which was.

LORD ELLENBOROUGH C. J. The place where the plaintiff is stated to have become a bankrupt is immaterial. He might have become bankrupt whilst a brewer at *Oxford*, by an act of bankruptcy committed at *Cirencester*. The substance of the words is this, he was a bankrupt at *Cirencester* : and so he might be whilst carrying on the trade of a brewer at *Oxford*. The declaration imports no more.

Per Curiam,

Rule refused.

Saturday,
May 8th.

ROBINS *against* GIBSON.

Where the drawer of a foreign bill of exchange at the time of the drawing was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest,

THIS was an action by the plaintiff as indorsee against the defendant as drawer of a foreign bill of exchange. It appeared at the trial before Lord *Ellenborough* C. J., at the *Middlesex* sittings, that the defendant drew the bill at *Buenos Ayres*, and previously to the time of its becoming due returned to this country. When the bill became due it was dishonoured and duly protested ; and notice of the dishonour, but not of the bill's having been protested, was left at the defendant's

and not of the protest, was left at the drawer's house : Held that this was sufficient.

house.

house. His lordship held the notice sufficient, and the plaintiff had a verdict.

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Puller moved for a new trial, upon the ground that this being a foreign bill, and as such requiring to be protested, a mere notice of the dishonour left with the drawer, without the protest, or at least a copy or notice of the protest, was insufficient. He referred to what was laid down by *Holt C. J.*, in *Brough v. Parkins (a)*, viz. "that the protest on a foreign bill of exchange is part of the custom," and therefore it must be communicated to the party. If the defendant had remained abroad instead of returning to this country before the bill was due, there is no doubt that he must have had the protest.

LORD ELLENBOROUGH C. J. It did not appear that the defendant requested to have the protest, and it would be hazarding too much to leave it without some request. He had due notice of the fact of dishonour of the bill; and as the circumstances of parties alter, the rule respecting notice also changes, according to the convenience of the case. If the party is abroad he cannot know of the fact of the bill's having been protested, except by having notice of the protest itself; but if he be at home it is easy for him by making inquiry to ascertain that fact.

Per Curiam,

Rule refused (*b*).

(a) 2 *Ld. Ray.* 993.

(b) See 2 *Esp. N. P. C.* 511., *Cromwell v. Hynson*.

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Saturday,
May 8th.

TAYLOR and Another, Assignees of WALSH, a
Bankrupt, *against* BREWER and Others.

Where a person performed work for a committee, under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right:" Held that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due.

ASSUMPSIT to recover a compensation for work done by the bankrupt. The defendants composed a committee for the management of the sale of lottery tickets, and the bankrupt was employed in going backwards and forwards upon their business. The plaintiffs founded their claim to compensation on the following resolution of the committee: 4th *January* 1810, at a meeting, &c., present, *Brewer, &c.*, Resolved, that any service to be rendered by *Walsh* shall, after the third lottery be *taken into consideration, and such remuneration be made as shall be deemed right.* Lord *Ellenborough* C. J. was of opinion at the trial, that under this resolution it was optional in the committee to remunerate the bankrupt or not, according as they should think right, and therefore nonsuited the plaintiffs.

Park moved to set aside the nonsuit, on the ground that the bankrupt was entitled to some recompense; inasmuch as an agreement with a person that he should do work, and should have what is right for it, did not import that he should have nothing for his trouble if his employer should be so minded, but that he should have a reasonable reward: it should have been left therefore to the jury to consider what was reasonable, as was done in *Peacock v. Peacock.* (a)

(a) 2 *Camp. N. P. C.* 45.

LORD ELLENBOROUGH C. J. In that case the defendant expressly told the plaintiff that he should have a share in the business, leaving only unsettled what particular share he was to have: but here, I own it struck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labour deserved any thing he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted; and the same thing does not unfrequently happen in contracts with several of the departments of government.

GROSE J. I consider the resolution to import that the committee were to judge whether any or what recompense was right.

LE BLANC J. It seems to me to be merely an engagement of honour.

BAYLEY J. The fair meaning of the resolution is this, that it was to be in the breast of the committee whether he was to have any thing, and if any thing, then how much.

Rule refused.

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Saturday,
May 8th.BLUNDELL, Clerk, and THOMPSON, *against*
HOWARD.

ACTION against the defendant, occupier of a farm in the township of *Down Holland*, for not setting out tithes. Defence, a farm modus; and the plaintiff shewed by survey, and terriers that no modus within the township was mentioned in them; against which the defendant proved by witnesses an uniform payment of a sum certain in respect of his tenement for upwards of 50 years: Held that the plaintiff might on cross-examination ask those witnesses whether other tenements in *Down Holland* did not pay a similar sum.

DEBT by *Blundell* as rector of *Halfall*, and *Thompson* as lessee of a moiety of the tithes, on stat. 2 *Edw. 6.* against the defendant, occupier of a farm situate in *Down Holland*, (one of the five townships of which the parish of *Halfall* consists) for not setting out the tithe of hay and potatoes growing upon the said farm.—Plea, the general issue. The defence was a modus of 4s., payable at *Easter annually* in respect of all tithes arising from the farm, except corn and horse beans.

At the trial before *Le Blanc J.* at the last *Lancaster* assizes, the plaintiff (the rector) did not rely merely on his common law-right to tithes in kind, as rector, but also produced documentary evidence; viz. the general ecclesiastical survey 26 *H. 8.*; the parliamentary survey 1658; and several terriers of the years 1696, 1709, 1738, 1742, 1778, 1789. The surveys were silent as to any township or farm modus, and the former mentioned tithes as payable throughout the parish, and the latter within the township of *Down Holland*; and the terriers made no mention of any modus in this township. On the part of the defendant several witnesses proved an uniform payment, for upwards of 50 years last past, in respect of the defendant's estate, of 4s. at *Easter annually* in lieu of all tithes, except corn and horse beans. These witnesses were asked on cross-examination, "Whether other tenements in *Down Holland* did not pay a similar sum?" to which question the defendant's counsel objected, on the ground that the issue being whether
this

this particular tenement was under a modus, it was not competent to the plaintiffs to inquire whether other tenements in the same township paid a similar sum, in order to derive from a question respecting a collateral matter, an answer which might be prejudicial to the point in issue : but the learned Judge permitted the question to be put, and the witnesses having answered that other tenements in *Down Holland* did pay a similar sum, the counsel for the plaintiffs in his reply relied much on this circumstance as shewing that this, with the other payments, was made as a portion of some composition pervading the township, and not as a modus ; inasmuch as the survey which mentioned the township of *Down Holland* could not have been silent as to a modus so general : and the plaintiffs obtained a verdict.

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Topping moved for a new trial, renewing his objection to the admissibility of the evidence.

But the Court concurred in opinion with the learned Judge at the trial.

LE BLANC J. The question was not put by the defendant with a view of supporting the modus set up by him ; but was put by the plaintiffs to shew that, coupled with the silence of the survey as to any modus, co-extensive with the township, this and the similar payments made in respect of different tenements within the township were portions of a sum in gross paid throughout the township by way of composition for tithe, and not as a modus.

BAYLEY J. I think the question was admissible. The point in issue was, whether there existed a modus for a

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particular farm. The surveys shewed that there was not any modus co-extensive with the township, or applicable to this farm; but an uniform payment was proved to have existed for a number of years, and the doubt was whether this were an ancient payment or a composition. Then the question admitted in evidence went to shew the state of the district, of which the farm in question formed a part, with respect to such payments.

Lord ELLENBOROUGH C. J. added, that the parliamentary survey had been taken with great pains and accuracy; and that document being silent as to the modus, of itself afforded strong evidence against its existence.

Per Curiam,

Rule refused.

Saturday,
May 8th.

DOE, on the Demise of WRIGHT and Others,
against MANIFOLD and Another.

The 29 Car. 2. c. 3., which requires a will of lands to be attested and subscribed in the presence of the devisor, means that he should be in a situation that he may see the witnesses attest: therefore where the attesting witnesses retired from the room

EJECTMENT tried before Gibbs J., at the last assizes for the county of *Derby*, brought by two of the three coheiresses of — *Cook*, deceased, against the defendants, who claimed the entirety under his will.

The question was whether the will was duly attested by the witnesses in the presence of the testator: as to which it was proved that the testator lay in bed when he executed the will; that the head of his bed was placed against a partition which separated the bed-room from

where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that the testator was not in such a situation in the room that he might by so inclining have seen them: Held that the will was not duly attested.

another

another room. The door of each of these rooms opened into the same passage; and a night-chair was placed between the testator's bed and the door of his bed-room, very near to the door. After the testator had signed the will, there being no table in his bed-room, the witnesses retired to the other room, and wrote their attestation at a table, which stood before the fire-place of that other room, and the doors of both rooms were open. While the witnesses were retiring for that purpose, with the will, into the other room, the testator called to his attendant who was in the room, using an expression which he commonly used when he required his assistance, to help him to the night-chair; but there was no farther proof of his going to the night-chair.

A number of witnesses swore that a person standing in the bed-room might, by inclining his body and advancing his head through the door-way into the passage, see the table in the other room at which the witnesses wrote their attestation; and several swore that they thought it might be seen by a person sitting on the night-chair and so advancing his head into the passage. Upon this evidence the learned Judge left several questions to the jury; 1st, Whether the testator did actually see the witnesses attest the will: which the jury found in the negative. 2dly, Whether a person being in the bed-room might, by inclining his body and advancing his head into the passage, have seen the witnesses attest the will: upon which they found that he might. And, lastly, Whether the testator was in such a situation in the room that he might, by so inclining his body and advancing his head into the passage, have seen the witnesses attest the will: and the jury found that he was not. Upon which the learned Judge told them that he was of opinion that the

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will was not duly attested, and that the plaintiff was entitled to a verdict for two-thirds of the premises; and they found accordingly: but he gave the defendants leave to move for a nonsuit.

Clarke accordingly moved on the ground that this was an attestation in the presence of the devisor, within the meaning of the statute of frauds (*a*); for that it was not necessary that a testator, at the time of the attestation, should be in such a situation that he himself might see the witnesses; provided he was in a room from whence they could be seen; and he cited *Sheers v. Glasscock* (*b*).

LORD ELLENBOROUGH C. J. It is not necessary that a devisor should actually see; but the question is, whether he must not be in such a situation that he might see the witnesses attest. I am old enough to remember the decision of *Casson v. Dade* (*c*) upon that point, and afterwards went to view the office, through the window of which it was proved that the testatrix, who sat in her carriage when the will was attested in the office, might have seen what was passing there. In favour of attestation it is presumed that if the testator might see, he did see. But I am afraid that if we get beyond the rule which requires that the witnesses should be actually within the reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence; as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence (*d*). If the

(*a*) 29 Car. 2. c. 3. f. 5. (*b*) Carth. 81. Salk. 688. 1 Eq. Abr. 403.

(*c*) 1 Bro. C. C. 99.

(*d*) See *Eccleston v. Petty al. Speke*, Carth. 80. Comb. 156. 1 Show. 89. Holt, 222. *Broderick v. Broderick*, 1 P. Wms. 239. *Macbell v. Temple*, 2 Show. 288.

jury had not negatived the testator's being in a situation that he might have seen the attestation, I should have had great doubts on this case.

BAYLEY J. In the case of *Sheers v. Glasscock* it was proved that the testator *might* see, from the bed where he lay, the table at which the witnesses subscribed their names (a).

Per Curiam,

Rule refused.

(a) See also *Davy v. Smith*, 3 Salk. 395.

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ROE d. DINGLEY against SALES.

Saturday,
May 8th.

EJECTMENT for the recovery of premises demised for a term of years by the lessor of the plaintiff to the defendant. The lease contained a proviso for re-entry in case the "defendant, his executors or administrators, should demise, lease, grant, or let the said demised premises, or any part or parcel thereof, or convey, alien, assign, or set over the indenture or his or their estate therein, or any part thereof, to any person or persons whomsoever, for all or any part of the said term, without the special licence and consent of the lessor, his heirs or assigns, in writing under his or their hand or hands for that purpose first obtained." It appeared on the trial, at the last *Kent* assizes, that the defendant, without the licence of the lessor, had let a person of the name of *Pincheon* into the occupation of part of the premises, under the following terms: "that he (*Pincheon*) should have the use of the back cham-

Where a lease contained a proviso for re-entry in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey, &c. to any person whomsoever, for all or any part of the term, without the licence of the lessor in writing; and the defendant, without such licence, agreed with a person to enter into partnership with him, and that he should have the use of the back-chamber and some other parts of

the premises *exclusively*, and of the rest jointly with the defendant, and accordingly let him into possession. Held that the lessor was entitled to re-enter.

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DINGLEY,
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“ her exclusive of his (the defendant’s) family, the
 “ saw-lodge, the whole length of the cow-shed to the
 “ stable, and any part of the yard for laying timber, or
 “ otherwise, *Pincheon* to have jointly with the defend-
 “ ant’s family the use of the other part of the house, as
 “ also the garden, which premises *Pincheon* is to deliver
 “ up on being required so to do, on having three months
 “ notice from the defendant; and it was agreed that the
 “ said parties should enter into partnership in the busi-
 “ nefs of general shopkeeper, each to bring in an equal
 “ sum of money, and equally divide the profits of the
 “ goods sold therein, as well as the produce of the gar-
 “ den.” Upon this evidence a verdict was found for
 the plaintiff.

Best Serjt. moved for a new trial, on the ground that this was not such a letting or assigning as was contemplated in the proviso: it was merely accommodating *Pincheon* with a lodging in the house, whilst he and the defendant carried on business in partnership together; for which *Pincheon* was not to pay any rent; and the defendant still continued to occupy the premises as tenant, and to be answerable to the lessor for the rent and services in respect of the whole in the same manner as before. Such a letting, therefore, ought not, consistently with the strict rule of construction adopted in cases of forfeiture, to be held within the meaning of this proviso.

Lord ELLENBOROUGH C. J. It is a parting with the exclusive possession of some part of the demised premises; whether gratuitously or for rent reserved is very immaterial to the landlord, who meant to guard against

having any other than the person in whom he confided as tenant, let into possession without his consent.

Per Curiam,

Rule refused.

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Lessee of
DINGLEY,
against
SALES.

GOODTITLE, on the Demise of RADFORD, *against* SOUTHERN. *Saturday, May 8th.*

EJECTMENT for two closes of land in the parish of *Darley*, in the county of *Derby*, tried before *Gibbs J.* at the last assizes for that county. The defendant claimed under the following devise in the will of *Richard Southern*: "I give and devise *all* that my farm, lands, and hereditaments called *Trogues-farm*, situate within the parish of *Darley*, in the county of *Derby*, now in the occupation of *A. Clay*, unto my brother *John Southern*, and to his heirs and assigns for ever." The lessor of the plaintiff claimed under the residuary clause in the same will; which it was admitted would entitle him to the premises in question, provided they did not pass to the defendant under the above devise. On the part of the lessor of the plaintiff it was proved that *Trogues farm* was in the occupation of *A. Clay*; but the closes in question were not in his occupation, but in the occupation of one *Marsden*: and in order to shew that they were not parcel of *Trogues farm*, and that the testator *Richard Southern* did not take them as such, the will of one *Houghton*, deceased, was produced; which contained the following devise (inter alia) to *R. Southern*, "Also all that piece or parcel of ground situate in the liberty of *Wansley*, and in the parish of *Darley*, commonly called or known by the name of *Trogues*, otherwise *Trough's-pasture*; and also

Devise of "all that my farm called *Trogues-farm*, now in the occupation of *A. G.*," is not necessarily limited to the lands of *Trogues farm* in the occupation of *A. G.*, but may be shewn by evidence to extend to other lands of *Trogues farm* not in his occupation.

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all those *two closes* of land situate at the bottom of the pasture called *Trogues*, otherwise *Trough's* pasture, called by the name of the *Dale-closes*." *R. Southern*, when he became entitled to this land under *Houghton's* will, about 13 years since, let the two closes to *Marsden*, and evidence was offered of payment of rent by *Marsden* to *R. Southern*, in order to shew that *R. Southern* knew in whose occupation the land was. On the part of the defendant, a notice to quit was proved, which had been given to *Marsden* by *R. Southern* a few months before the time of making his will; which notice was in these terms: "I do hereby give you notice to quit and deliver up the possession of all my lands *belonging to and called Trogues-farm*, situate in the parish of *Darby*, now in *your possession*, on or before *Lady-day* next." This evidence was objected to by the counsel for the plaintiff, but was admitted by the learned Judge, and thereupon the plaintiff was nonsuited.

Vaughan Serjt. now moved to set aside the nonsuit, on the ground that this being a specific devise of *Trogues-farm* in the occupation of *Clay*, and *Trogues-farm* being proved in his occupation, there was a clear description of property for the devise to operate upon; and consequently it admitted of no extension to other lands, not in the occupation of *Clay*, although they might be parcel of *Trogues-farm*: for such a construction would amount to a complete rejection of the words "in the occupation of *Clay*." And as the devise would admit of no extension, the evidence which was received for the purpose of extending it was consequently improperly received.

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LORD ELLENBOROUGH C. J. Parcel or no parcel is always a question of evidence for a jury; and in the same manner it was competent to shew here, if there was any doubt, that the two closes were parcel of *Trogues-farm*, by which name the thing devised was sufficiently ascertained. The testator certainly contemplated these closes as parcel of *Trogues-farm*, when he gave the notice to quit. That is clearly an exposition of the description which he used in his will. As to the argument, that the words of the devise are satisfied by applying them to the farm in *Clay's* occupation, and therefore cannot be extended to the closes in question; it may be answered that if these closes were parcel of *Trogues-farm*, the word "all" in the devise would not be satisfied without including them. The testator was mistaken as to the person in whose occupation the two closes were; but the devise is sufficiently comprehensive: it is clear that he meant to pass all which was called *Trogues-farm*, which is a plain and certain description; and the defective description of the occupation will not alter the devise.

LE BLANC J. The only question is on the admissibility of the evidence; and that question has been determined by the cases; some of which have been before the Courts very recently (a). This was clearly a latent ambiguity, which may be explained by evidence.

BAYLEY J. The testator devises "all his farm called *Trogues-farm*;" and it was competent to shew by evidence of what parcels that farm consisted.

Per Curiam,

Rule refused.

(a) 5 East, 79. *Roe v. Vernon*. 11 East, 58. *Goodright v. Pearson*. 5 East, 309. *Marshall v. Hopkins*.

1813.

Monday,
May 10th.

FRENCH *against* BELLEW and CULLIMORE.

Where an affidavit of debt contained no place in the jurat, but purported to be sworn before the Chief Justice of the King's Bench of *Ireland*, and to be signed by him, and such signature was verified by affidavit here: Held that it was sufficient foundation for arresting the defendant under a Judge's order on mesne process.

THE defendant *Cullimore* was arrested on mesne process in this cause by a Judge's order, upon an affidavit of debt for 1200*l.* purporting to be sworn before the Chief Justice of the King's Bench of *Ireland*, and to bear his signature, but no place was mentioned in the jurat: but the signature of the Chief Justice was verified by an affidavit sworn before a Judge of this court at Serjeants' Inn.

Richardson moved to discharge the defendant out of custody upon filing common bail; on the ground that the affidavit of debt ought to have contained some place or county, or at least the affidavit verifying it should have supplied the omission by shewing where it was made: otherwise, if false, the party making it could not be indicted for perjury in the courts of this country or in those of *Ireland*; the law of *England* and *Ireland* being in this respect the same. And admitting, according to *Omealy v. Newell* (a), that the affidavit need not be such as, if false, to be capable of supporting an indictment specifically for perjury; yet, as the using a false affidavit was considered in that case to be punishable by indictment, it must be in such form as to be capable of supporting an indictment for that offence; which this affidavit is not *causâ quâ supra*. Besides, although this Court so far takes judicial notice of the authority of the Judges both of *Ireland* and *Scotland* to take affidavits, as not to require any verification of their competence so to

(a) 3 *East*, 364.

do; which in the case of affidavits made before foreign magistrates it always requires; yet it goes no farther: and therefore in such cases it is necessary to shew that their authority was exercised within its proper jurisdiction.

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LORD ELLENBOROUGH C. J. The only question is this, whether in the exercise of our discretion we must not presume that the Chief Justice of *Ireland* acted within that jurisdiction within which alone he was competent to act, viz. by taking the affidavit and subscribing his name to it in *Ireland*. I think we cannot presume that he acted in this case out of his jurisdiction. The practice of the Court in requiring an affidavit to be made for the purpose of arresting under a Judge's order is for the guidance of its discretion, that the amount of the debt may be made to appear before it interposes its authority. It is in the nature of a solemn certificate of the existence and reality of the debt: but that may be made to appear by any such species of evidence as the Court may deem in its nature reasonable. Is this then such a solemn certificate as the Court may reasonably be satisfied with? I think, considering the high office of the person whose signature the affidavit bears, we ought to give credence to it as an act done conformably to the authority vested in him. The principle of holding a party to bail under the authority of the Court was much considered in *Omealy v. Newell*.

LE BLANC J. It is not necessary in all instances that the affidavit of debt should be in that form which is capable of supporting an indictment for perjury; for then an affidavit of debt sworn before a magistrate in a foreign country would be insufficient; whereas the Court is in
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the habit of acting upon such affidavits: and on the other hand refuses to admit them when sworn before a justice of the peace or mayor of a borough. This shews that the criterion of receiving such affidavits is not that the party making them may be indicted for perjury if false, but that they are only to guide our discretion here in ordering bail.

Per Curiam,

Rule refused.

Tuesday,
May 11th.

ROWE *against* ROACH. (a)
Same *against* HOAR the Younger.

Where the declaration stated that the plaintiff was lawfully possessed of mines and

CASE for slander of title. The declaration stated that the plaintiff, before and at the time of committing the grievance, was *lawfully possessed* of certain copper ore gotten and to be gotten from them, and was in treaty for the sale of the ore, and that the defendant published a malicious, injurious, and unlawful advertisement cautioning persons against purchasing the ore, &c. per quod he was prevented from selling; to which the defendant pleaded in justification that the adventurers of, or persons having an interest or shares in the mines, thought it their duty to caution persons against purchasing the ore, &c. (pursuing the words of the advertisement); this plea was held ill on special demurrer; 1st, because it did not disclose the names of the adventurers, or who they were: and 2dly, because it did not shew that the defendant, in publishing the advertisement, acted under the direction of the adventurers. The allegation by plaintiff that he was lawfully possessed of the mines and ore, seems a sufficient allegation of title, unless specially demurred to. The allegation that the defendant published a malicious, injurious, and unlawful advertisement, seems good without the word false.

mines

(a) This and several other cases, which will be noted as they occur, were argued at Serjeant's-Inn Hall. At the end of last term, in consequence of the accumulation of cases standing in the special paper, Lord *Ellenborough* C. J. announced to the bar that the Judges of this court would sit at Serjeant's-Inn on the 25th of *April*, (being some days before the commencement of *Easter* term,) for the purpose of hearing the cases argued; and they accordingly sat there and were attended by counsel, and heard many of them argued on that and several successive days, and expressed their opinion in some, and in others reserved it for farther consideration. Such of the cases as were not reserved, were afterwards called on the first paper day in this term;

mines situate in the parish of *St. Austell*, in the county of *Cornwall*, called the *Crinni's* mines, and of certain copper ore got and to be gotten from them of a large value, and was about to contract and was in treaty for contracting with certain persons called the Crown Copper Company for the sale to them of divers large quantities of ore, &c. : that the defendant, well knowing the premises, but intending to injure him in the possession of the mines and in the sale of the said ore, and to deprive him of the profits to be derived therefrom, wrongfully and unlawfully printed and published, and caused to be printed and published in a certain public newspaper a certain *malicious, injurious, and unlawful* paragraph or advertisement of and concerning the said mines and the sale of ore therefrom to the tenor following : “ To the purchasers of copper ore from *Crinni's* mines, in the parish of *St. Austell*. The adventurers of those mines think it their duty to caution persons against purchasing the ores arising from the same, as they will be liable to be called on for the amount by the adventurers ; a bill in equity being under preparation to restrain the future sale, and for an account of the produce arising from the past, with a manager or receiver, and an injunction against any future sale ;” per quod the Crown Copper Company refused to contract with him, and the plaintiff

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term ; when Lord *Ellenborough* C. J. formally pronounced judgment in them ; and they are now reported as of the day on which the judgment was so pronounced. The Reporters think it their duty to state that they were absent from *London* during the time that the sittings were holden at Serjeant's-Inn ; and that they are indebted to the kindness of two gentlemen at the bar for the notes, from which the reports of all the cases there argued are compiled ; for which they beg to return their grateful acknowledgments to those two gentlemen.

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was prevented from selling to them and others, &c. There was a second count, which did not materially vary from the former. The defendant pleaded, 1st, not guilty; and 2dly, as to the printing and publishing the several paragraphs, &c. in the declaration mentioned, &c. that before and at the time of printing and publishing, &c. *the adventurers of or persons having an interest or shares in the said mines*, thought it their duty to caution persons against purchasing the ores arising from the same, as such persons so purchasing would be liable to be called on for the amount, by the adventurers or persons having an interest or shares in the said mines, and a bill in equity was at the time of the printing and publishing, &c. in preparation, and intended to be filed in the Court of Chancery against the plaintiff by the adventurers of or persons having an interest or shares in the said mines, to restrain the future sale of the ore arising from the said mines, and for an account of the produce arising from the ore before gotten by the plaintiff from the said mines, with a manager or receiver, and for an injunction against any future sale of the said ore. Wherefore the defendant printed and published, and caused to be printed and published, the paragraph or advertisement in the declaration mentioned, as he lawfully might for the cause aforesaid. To this plea there was a demurrer, assigning for causes, 1st, that it is not alleged, nor does it appear in or by that plea, who were or are the supposed adventurers of or persons having or claiming to have an interest or shares in the said mines in that plea mentioned, or what were or are the names of those persons, or of any of them: 2dly, that it does not appear that the several paragraphs or advertisements mentioned in the plea were printed and published by the

the

the defendant at the request, or by the direction, or with the privity of the adventurers of or persons having an interest or shares in the said mines in the said plea mentioned: 3dly, that it does not appear that the printing and publishing the said paragraphs or advertisements were done in the exercise of the supposed duty in the plea mentioned: 4thly, that it does not appear that it was necessary, for the purpose of securing or protecting the rights, claims, or interests of the before mentioned adventurers or persons in the plea mentioned, that the said paragraphs and advertisements should be so printed and published by the defendant, as in that plea alleged: 5thly, that although it is alleged, that the adventurers and persons did think it their duty to caution persons against purchasing the ore arising from the said mines, yet it does not appear that it was their duty or that they had any right so to do: and lastly, that the said plea is not sufficiently explicit to enable the plaintiff to prepare himself to negative or falsify by evidence the pretended interest, shares, or claims of those persons; and that the said plea is much too general, and that no safe, certain, or sufficient issue can be taken by the plaintiff thereon; and also that the said plea is in other respects uncertain, defective, and insufficient in law. Joinder in demurrer

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Richardson, in support of the demurrer, insisted upon the two first causes assigned: 1st, that the names of the adventurers or persons claiming to have an interest in the mines were not stated; 2dly, that there was no connection shewn between the adventurers and the defendant. 1st, It was incumbent on the defendant to apprize the plaintiff who were the adventurers that claimed, in order

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der to give him an opportunity of meeting their claims, and of shewing, if he was able, that they had no colour of right: for if they had a bonâ fide claim, it must be admitted, after what was laid down in *Sir G. Gerard v. Dickenson* (a), and was decided in *Hargrave v. Le Breton* (b), and *Smith v. Spooner* (c), that such an action as the present would not be maintainable against them, nor against the defendant if he was acting under their authority: but then in order to shew that they had a bonâ fide claim, it is necessary to shew first who they are that claim, otherwise both they and the defendant must be taken as mere intruders. The declaration states a primâ facie title in the plaintiff; the plea, therefore, which cannot be good unless the slander imputed by the declaration was published under some colour of right, should at least have disclosed to the plaintiff so much as would have led him to a knowledge of the persons claiming that right. But 2dly, supposing it unnecessary to name the persons in whom the interest is alleged, and that it may be done in this general way, still the plea is defective; because it does not shew that the defendant was either one of those unnamed persons, or that he was acting under their authority and on their behalf; so that the slander does not appear by the plea to have been published either in maintenance of his own title or of the title of those for whom he was concerned. Neither if the plea had so alleged would it have helped the defendant; because the publication does not import that it was for himself, which is lawful; but on the contrary for the purpose of countenancing the title and interest of strangers, which is not lawful; and therefore when he is sued for it, he cannot excuse himself

(a) 4 Rep. 18. a.

(b) 4 Burr. 2422.

(c) 3 Taunt. 246.

by intitling himself, when the publication at first did not import as much. *Pennyman v. Rabanks (a)*, *Earl of Northumberland v. Byrt (b)*.

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Bayley, for the defendant, did not address himself in answer to the above causes of demurrer, but took objection to the declaration, 1st, that it did not set forth any certain title in the plaintiff. It states that he was lawfully possessed of the mines; and so he might be as tenant at sufferance; and yet a tenant at sufferance cannot sell: or he might be possessed by virtue of a bailment for a special purpose only, and without any power of disposal: a possession of either sort would be enough to satisfy this allegation, and yet neither would entitle the plaintiff to this action. Besides in all the precedents upon this head, some title in certain will be found to be alleged, as derived either by seisin in fee, in tail, or for life, &c.: whereas this rests upon a bare possession of the mines and of the ore. 2dly, The declaration states no words of direct charge against the title of the plaintiff, without which they are not actionable. *Crush v. Crush (c)*. *Sir T. Gresham v. Grinsley (d)*. Neither does it allege that the publication is false.

LORD ELLENBOROUGH C. J. The allegation that it was malicious, injurious, and unlawful, is sufficient. The first objection to the declaration is the only one of any weight; and the answer to that is, that it should have been taken advantage of by special demurrer.

(a) *Cro. El.* 427.(c) *Rel.* 80.(b) *Cro. Jac.* 163.(d) *Ibid.* 88.

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Then as to the causes of demurrer assigned by the plaintiff, they seem to me to be established. For the defendants, as far as appears from these pleadings, are mere strangers; and the law makes no allowance for the slander of strangers, whatever it may do in behalf of those who have a real title, or a claim of title. “*Rei immiscet se alienæ*” (a) is the good sense which must govern this case: here the defendant is a stranger himself, and shews no authority from those who are parties in interest.

Per Curiam,

Judgment for the Plaintiff.

(a) 1 *Jenk. Cent.* 247. pl. 36.

Tuesday,
May 11th.

MIDDLEHAM *against* BELLERBY. (a)

Where the putative father of a bastard child gave a voluntary bond, and not under the compulsion of stat. 6 G. 2. c. 31., to the parish officers conditioned for the payment of a sum certain every three months until the child should be deemed capable of providing for herself: Held that such bond was good, and the condition sufficiently certain.

DEBT on bond. The declaration set forth the condition of the bond, which was for payment by the defendant to the plaintiff, then overseer, and to the overseer for the time being of the township of *Shadwell*, in the parish of *Thorner*, in the county of *York*, of the sum of 1*l.* 19*s.* every three months for so long as and until a certain bastard child (of which the defendant was recited to be the putative father) should be deemed capable of providing for herself. The breach assigned was, in not paying, &c. to the plaintiff, or the overseer for the time being, according to the terms of the condition, although the said child was still living, and not capable or deemed capable of providing for herself.

(a) This case was argued at Serjeants-Inn.

The defendant after oyer of the bond and condition, demurred to the declaration; assigning for cause, that it appears by the condition, that the bond was not, according to the statute, given to indemnify the parish; whereby the same was and is wholly void. Joinder in demurrer.

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Richardson, in support of the demurrer, admitted that the 6 G. 2. c. 31. does not expressly prohibit any other kind of security from being taken than what is there pointed out; but such a conclusion follows from the provisions and policy of the act of parliament. The policy of the act was to provide for such securities being given as should be strictly within the meaning of an indemnity to the parish: and by prescribing that as the end, it has in effect negatived any other: and therefore if this bond go beyond an indemnity to the parish, it will be void: and so it was decided in *Cole v. Gower* (a). Now here the bond does not appear to have been framed with reference to the indemnity of the parish; for the payment is not to cease in the event of the child's death or it's ceasing to be chargeable to the parish; both which are essential stipulations in the condition of such an indemnity bond: but it is to continue until the child is deemed capable of providing for herself; which is an object perfectly collateral to the indemnity of the parish. 2dly, At all events the condition to pay until the child is *deemed* capable is indefinite; it should have been until the child is capable.

LORD ELLENBOROUGH C. J. If a duty be imposed by statute, the parties who are called upon to execute that

(a) 6 East, 110.

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duty must comply with its provisions; and therefore if the defendant had been apprehended under the statute, and had given this bond in order to relieve himself from commitment, there might have been much weight in the argument; but the argument does not apply where the parties are not acting under the statute. This does not appear to be any thing more than a voluntary obligation entered into by the defendant with the object of providing for the maintenance of his child; and if we do not find that it is contrary to the general policy of the law, which was the case of *Cole v. Gover*, I see no reason why it should not have effect. The defendant still remains liable to indemnify the parish. Then looking to the obligation it amounts to this, that the putative father of an illegitimate child is willing to pay to the parish officers a reasonable sum every three months until his child is deemed capable of providing for herself. I see nothing in this against general policy, and I have before said it does not seem to me to be a case within the statute. Then the words “deemed capable” must be intended to mean until she shall be so deemed by a jury, which is sufficiently certain.

LE BLANC J. If the party is brought before a magistrate then the statute directs what shall be done; but here the party acts without any compulsion.

Per Curiam,

Judgment for the Plaintiff.

1813.

DAVIDSON and Another *against* WILLASEY (a). *Tuesday, May 11th.*

ACTION on a policy of assurance on freight, valued at 4000*l.*, upon the ship *St. Andrew*, “at and from any port or ports in *Jamaica* to her port of discharge in the United Kingdom.” The loss declared on was by perils of the sea. There were also the usual money counts. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term a verdict was found for the plaintiff for the whole amount of the defendant’s subscription, subject to the opinion of the Court on the following case :

The plaintiffs were owners of the ship, and in *June* 1811 chartered her to Messrs. *Horsfall* and *Hodgson* for a voyage from the port of *Liverpool* (where she was then lying) to the island of *Jamaica*, there to take in a full cargo of *West India* produce for *Liverpool* or *London*, at the option of the charterers. The charterers covenanted that they would cause the vessel to be full laden at *Jamaica* with such goods as aforesaid, and would pay freight at the average and current rate of freight from *Jamaica* to *Liverpool* or *London*, at the end of one month from the discharge of the cargo. The amount of the full freight according to the rate stipulated in the charter-party would have exceeded the sum insured. The ship arrived at *Jamaica*, and took on board one half of her homeward cargo ; and goods sufficient to have fully loaded her were on shore ready to be shipped, and would have been shipped within the limited time ; but two days before it ex-

Where a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool* at the current rate of freight, to be paid at one month from the discharge of her cargo at *Liverpool* ; and the ship owners effected a valued policy on the freight at and from *Jamaica* to her port of discharge in the United Kingdom ; and the ship arrived at *Jamaica*, and after taking on board one half of her cargo, was lost by storm, the remainder of her cargo being on shore and ready to be shipped : Held that the assured were entitled to recover as for a total loss.

(a) This case was argued at Serjeants Inn.

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pired the vessel was stranded and wholly lost by the perils of the seas ; and no freight has been earned by the plaintiffs. If the loss on the policy is total, the plaintiffs have not been paid : but if it is a partial loss, they have already received it from the defendant.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover a total loss. If they are so entitled, the present verdict is to stand ; otherwise a nonsuit to be entered.

Littledale, for the plaintiffs, relied upon the authority of *Montgomery v. Eggington* (a), *Thompson v. Taylor* (b), and *Horncastle v. Stuart* (c), as governing the present case, and especially the two latter, which were not materially distinguishable from it ; the only difference being, that there the loss happened before any part of the homeward cargo was shipped ; here some part had been put on board : and yet in the first of those cases, which was upon a valued policy, and in the other, which was upon an open policy, the Court held the underwriters liable as for a total loss. The case of *Forbes v. Aspinall* (d), where the policy was held only to cover the freight upon such part of the cargo as was on board at the time of the loss, is obviously distinguishable ; inasmuch as in that case there was no charter-party or contract under which the ship-owner, except for the perils insured against, would have been entitled to demand freight : but, as Lord *Ellenborough* C.J. observed, he could claim freight only for goods actually shipped ; the ship was a mere seeking ship, and it was uncertain whether any additional cargo would ever have been procured ; and if it had been ready, she was not in a condi-

(a) 3 T. R. 362.

(b) 6 T. R. 478.

(c) 7 East, 402.

(d) 13 East, 323.

tion to have received it on board. That decision, therefore, does not at all interfere with the cases relied upon.

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 DAVIDSON
 against
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Richardson, contra. The plaintiffs have a right to be indemnified against loss arising by perils of the seas; and no farther: and the question is, whether this can be said to be a total loss arising from that cause, or only a loss *pro tanto*, in proportion to the freight which would have accrued from that part of the cargo which was on board. The case of *Forbes v. Aspinall* decided that question; for there the freight which was accruing at the time of the loss was a very minute portion of the whole; and the Court held that the plaintiff was only entitled to an indemnity to that extent. It is true there was no charter-party in that case, and that in this, one does exist; but notwithstanding this difference, the reasoning there adopted applies. The existence of a charter-party does indeed advance the expectation of the ship-owner one step farther than where none such exists: but it does not secure to him the full freight at all events, if he be not prevented by the perils of the seas. Other events may interpose to prevent it, as the neglect or refusal of the charterers to supply a cargo, and such like, for which he would only be entitled to recover damages for the loss of freight, but not freight; which is only due upon the arrival of the cargo. *Blakey v. Dixon* (a). So that here it cannot be ascertained whether the plaintiffs would have received their full freight supposing the loss had not intervened. If therefore they can recover in this action for a total loss, they will be indemnifying themselves not only against actual loss

(a) 2 Bsf. & Pull. 341.

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by perils of the seas, but against all other casualties which might by possibility have occasioned a disappointment in their expectations under the charter-party.

LORD ELLENBOROUGH C. J. The interest intended to be insured was the freight which the assured would have earned under the terms of the charter-party, if the voyage had not been stopped by the perils insured against; which has been held for upwards of 20 years past to be an insurable interest as freight. Then the question is, whether the assured were in the prosecution of that interest so as to have acquired an inchoate right to the freight at the time when the loss happened. We cannot allow any weight to the arguments used to prove that they were not, without setting aside the cases of *Thompson v. Taylor*, and *Horncastle v. Stuart*, which are precise upon this point: and there seems to be no reason for disturbing them. The distinction between this case and *Forbes v. Aspinall* has been truly stated, and is a clear one: there, there was no charter-party, and the valuation on the policy was made with reference to freight upon all the goods intended to be carried on the voyage insured, a part only of which goods was lost, and the rest never were or might have been obtained; so that the loss was not total within the meaning of the valuation: but here the valuation is made with reference to the freight under the charter-party, the whole of which the plaintiffs have been prevented from earning by one of the perils insured against. The loss therefore is total within the meaning of the policy.

GROSE J. I have no doubt but that the cases already decided upon this point are right; and therefore we ought to abide by them.

LE BLANC J. The prior cases determined that in the case of a freight policy, where the assured has entered into a contract for freight, under which, except for the wrongful act of the party with whom he has contracted, he would be in a condition to earn his freight, if the voyage were not stopped by a peril insured against; there if the voyage has commenced in which the freight is to be earned, and be stopped by any of those perils, the assured will be entitled to recover to the full amount. In the case of *Forbes v. Aspinall* it was attempted to carry the prior cases farther, and to make the underwriter liable for a total loss, where there was no contract under which the assured could have demanded freight, and where several contingencies might have intervened to deprive the party of his full freight if the loss had not happened.

BAYLEY J. I am of the same opinion. The question is, to what extent the assured have been damnified by one of the perils insured against; for to that extent they are entitled to an indemnity. It appears to me that they must be considered either as having lost the benefit of taking on board a full homeward cargo, which would have entitled them to their full freight under the charter-party; or of fixing the freighters, if they had refused to complete their loading, with damages to the amount of the full freight; and I consider that the same as freight.

Judgment for the Plaintiffs.

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May 11th.

WILLIAMS *against* The LONDON Assurance
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Action on a policy on ship at and from *London* to the *East Indies*, until her arrival at her port of discharge on the outward voyage. Loss by perils of the sea. Ship was chartered from *London* to the *East Indies*, there to deliver her outward cargo and return thence with a cargo for *England* into the *Thames*, and there make a true delivery, &c.; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at *London*, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton; the ship failed on the voyage insured, and in the course of her outward voyage incurred an average loss, but was repaired and afterwards performed her voyage, and the freight was received: Held that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution.

DEBT on a policy of assurance on the ship *Dorsetshire*, valued at 6000*l.*, on a voyage at and from *London* to *Madeira*, the *Cape of Good Hope*, and all or any the ports or places in the *East Indies*, *China*, *Persia*, or elsewhere on this or the other side of the *Cape*, until arrived at her last port of discharge on the outward voyage. The loss declared upon was by perils of the sea. The defendants pleaded the general issue, and paid 2300*l.* into court. At the trial before Lord *Ellenborough* C. J., at the *London* Sittings after last *Trinity* term, a verdict was found for the plaintiff for 141*l.*, subject to the opinion of the Court on the following case:

By charter-party, of the 3d of *September* 1810, the plaintiff and *R. Williams* the younger, as part-owners, on behalf of themselves and the rest of the owners, chartered the ship to the *East India* Company, for a voyage from *London* to such ports in the *East Indies*, or within the limits of the Company's trade, as the Company should direct; and it was agreed, in consideration of the sum of 3000*l.* by the Company to be imprest or paid to the said part-owners, &c. at the ship's arrival at *Gravesend* outwards, in part of the freight and demurrage to grow due in respect of the intended voyage, &c. that the ship

(a) This case was argued at Serjeants Inn.

should

should take on board in her outward voyage a cargo not exceeding 913 tons, and should deliver the same at the consigned port; and there also take in any other cargo, and deliver the same at any other port, and so from port to port as the Company or their agents should direct; and finally return from her last loading port with a cargo for *England*, into the river *Thames*, within the port of *London*, and there make a right and true delivery into the Company's warehouses, &c. The charter-party also stipulated for the allowance to the Company, either by payment or deduction out of the freight and demurrage payable to the owners, at the rate of 5*l.* for every ton of the 913 tons which should be tendered by the Company and not taken on board; and that the Company should allow to them at the same rate for every ton exceeding 913. And as touching the freight to be paid or allowed by the Company, it was agreed that the Company should, *upon condition that the ship performed her voyage and arrived at London in safety*, and the part-owners and master performed the covenants on their part to be performed, and not otherwise, pay to the part-owners in *London*, at the times thereafter mentioned, and not before or otherwise, freight for every ton of goods that should be brought home in the said ship for account of the Company to the port of *London*, except the privilege goods of the master, officers, and ship's company, not exceeding 73 tons, as follows: "that is to say, [here followed a specification of the rates per ton according as the goods should be loaded at the different settlements of the Company,] and so for any greater or less quantity than a ton, to be computed as aforesaid. And it was also covenanted that if any of the goods that should be laden on board the ship in her outward voyage should be lost or not delivered at

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the ship's consigned port or ports ; in such case the part-owners should pay, or, at the election of the Company, allow to the Company out of the freight and demurrage to grow due, the full prime cost of such goods so lost or not delivered, together with 30*l.* for every 100*l.* on such prime cost ; but that no such payment should be made if there happened to be an utter and inevitable loss of the said ship and cargo, nor should any other payment be made for such goods as should necessarily perish or be cast into the sea in the outward voyage for the preservation of the ship and cargo, than by an average to be borne by the said ship, freight, demurrage, and cargo.

In *December* 1810 the ship sailed from the port of *London* on the voyage insured ; and on the 4th of *Jan.* 1811 met with a severe gale of wind, in which she lost her anchor and cables ; and was afterwards driven upon a sand near the *Nore*, and suffered considerable damage ; but with assistance was got off the sand, brought back to *London*, and unloaded ; and after being put into dock and repaired, she proceeded again upon the voyage insured ; and at the time of the commencement of this action was absent upon such voyage. The particular average on the ship amounted to 960*l.* 16*s.* 3*d.* The general average amounted to 5742*l.* 10*s.* 9*d.* The ship arrived in the *Thames* upon her return from the *East Indies* in the latter end of *October* 1812, with a homeward cargo on board, shipped on account of the Company, and at the time of the trial was in *Long Reach* in the *Thames*, but had not arrived at her moorings, or in a situation to deliver her homeward cargo.

The question for the opinion of the Court is, whether the freight payable under the charter-party is to contribute to the general average. If the Court shall be of
opinion

opinion that it ought not to contribute, the verdict is to stand: if otherwise, a nonsuit is to be entered.

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Taddy, for the plaintiff, maintained the negative of the question proposed; and, 2dly, supposing the freight ought to contribute, still the defendants are not entitled to the benefit of such contribution; 1st, The homeward freight is not liable to contribute to a general average incurred on the outward voyage. The voyage out and home is divisible by the terms of the charter-party, and the homeward freight does not become payable until the completion of the homeward voyage. Suppose then that this average had been adjusted (as it might have been) immediately upon the loss happening and the ship's return to its lading port; or that this action had been brought immediately after the loss; there were no means of apportioning the freight for the outward voyage (*a*), and there was not any homeward freight due or even growing due upon which contribution could have attached; for the whole was at that time in expectancy, and would not be payable unless the ship arrived at the port of her final destination (*b*). How then could the underwriter have set up any such deduction at that time? But without resorting to such a case, and taking it that this average was settled according to the usual custom (*c*), upon an estimate made at the ship's port of outward destination, the difficulty is precisely the same; because the freight was payable upon the homeward voyage; the result of which being at that time uncertain, the freight was

(*a*) 1 *New R.* 242. *Atty v. Lindo*, per *Mansfield C. J.*

(*b*) 7 *T. R.* 381. *Cook v. Jennings*. 8 *East*, 437. *Smith v. Wilson*. 10 *East*, 378, *Hunter v. Prinsep*. *Ibid.* 526. *Liddard v. Lopes*.

(*c*) *Molloy*, tit. *Aver.* s. 15.

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also unascertained. It does not remove this difficulty to answer that the voyage out and home would, for some purposes, be considered as entire; and that if this had been a policy upon the freight, an inception of the outward voyage would have given the plaintiff an inchoate right to the homeward freight, so as to have entitled him to recover it from the underwriter, and that this was so determined in *Thompson v. Taylor* (a), *M'Kenzie v. Shedden* (b), and *Horncastle v. Stuart* (c). All this may be admitted without prejudice to the plaintiff, because it does not apply, inasmuch as this is an insurance upon the ship, and not on the freight. But, 2dly, Whatever may be the construction of the charter-party as to the entirety of the voyage, it is quite clear that the defendants cannot avail themselves of it; because by the terms of their policy they have expressly made the voyage divisible, if it were not already made so by the charter-party. The policy is not in this case coextensive with the charter-party, but is upon the outward voyage only, and the risk is to cease on the ship's arrival at her outward destination; and therefore the underwriters cannot claim the benefit of contribution from a subject-matter which accrued after the termination of their risk.

Richardson, contra. The only question is, to what extent is the assured in this case entitled to indemnity at the hands of the underwriters: which depends upon this, viz. how far the loss which has happened became a charge upon the owner of the ship; for if he be recouped in damages by the contribution of other parties, or be liable to contribute himself in a separate character from

(a) 6 T R. 478.

(b) 2 Camp. N. P. C. 431.

(c) 7 East, 400.

that of owner of the ship ; so far his claim to indemnity will be reduced, and the underwriters at liberty to take advantage of such reduction : because they have only contracted to indemnify him against loss as ship-owner, and not as owner of the freight. The things liable to contribute to general average are the ship, the goods which properly compose the cargo, and the freight (a) ; which in different countries contribute in different degrees ; but in this, to the full value of the ship and freight, after deducting certain incidental expenses ; and this is reasonable, for the freight is as much preserved to the owner as the ship or the goods. Here the plaintiff, as freight-owner, was in the course of earning his freight under the charter-party at the time when the loss happened ; and there is no longer any uncertainty as to the event, since he has actually received the freight at this time. (This was admitted on the other side.) The plaintiff therefore has been benefited by the repairs done to the ship to the whole amount of his freight, which has been thereby preserved to him. As to the argument that it was uncertain at the time of the loss whether any freight would be earned, the same might be urged in every case of contribution, where the loss happens in the course of the voyage ; in the case of goods, it is uncertain what value is to be put upon them until the ship arrive at her destination ; and yet it cannot be disputed that goods are contributory. Neither does it make any difference in this case that the charter-party is upon a voyage out and home. Suppose it had been limited to the outward voyage, what greater degree of certainty would there have been, at the time of the loss, of the ship's earning freight ? If, as has been supposed, the contribution had been adjusted before

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(a) 2 T. R. 407. *Da Costa v. Newnham*.

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the freight was earned, it must have been done upon an assumption that the voyage would be completed and the freight earned; and then if this action had been brought, the defendants would still have had the benefit of it: but the plaintiff would have had no right, by bringing his action prematurely, to oust them of that benefit. Then as to the voyage being divisible by the charter-party, it is true that the freight is to be calculated upon the homeward cargo; but that is only a mode of calculating the whole returns payable as freight for the use of the ship out and home. The whole freight is entire under the contract, and according to the cases cited and not disputed, the ship was in the course of earning it on the outward voyage. If then the freight be contributory it operates to the extent of that contribution as an indemnity to the ship-owners; and it matters not that the policy, under which the defendants claim to deduct to that extent, is not coextensive with the charter-party under which the contribution is made; because the underwriters are entitled to avail themselves of an indemnity from whatever source that indemnity may arise. [Lord *Ellenborough* C.J. Does it signify at what time the freight is made payable; whether immediately, or at the termination of the voyage, or on a contingency as here; when paid must it not contribute to an average, but for which, it would have been wholly lost; and will not such contribution operate in reduction of the damages? The principle of *Godfall v. Boldero* (a) seems to govern this.]

Taddy, in reply, took this distinction between *Godfall v. Boldero* and this case, that there the indemnity re-

(a) 9 *East*, 72.

ceived was to the full amount, so that the whole subject-matter of the insurance was gone, and there was no subsisting cause of action: whereas here a cause of action still subsists, and the underwriters only set up a partial indemnity. But although the ship-owner, if he receive contribution, may perhaps be chargeable in equity as a trustee for the underwriter, it is no answer to an action at law; and the circumstance of the ship-owners in this case being also freight-owners will not vary the law. [Lord *Ellenborough* C. J. If the freight-owners are liable to contribute to themselves as ship-owners, I think we must intend that they will pay themselves.

LORD ELLENBOROUGH C. J. This is the case of an insurance on the outward voyage, on a ship chartered for a voyage out and home; in the course of which outward voyage an average loss has happened; and the question is, whether the freight payable under the charter-party is liable to contribute to general average. It is contended that the whole freight out and home is not liable: but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution: and the difficulty as to the outward and homeward voyage seems to be re-

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moved by the consideration that the whole freight was saved by the repairs. In *Godfall v. Boldero* it was resolved that a contract of insurance being a contract of indemnity, if the damage likely to result from the loss was obviated, the foundation of any action on the ground of such insurance was gone: and that the source from which such indemnity was derived, was immaterial.

LE BLANC J. The stress of the argument for the plaintiff is this, that the contribution was uncertain at the time of the loss. But in all cases of contribution to general average freight cannot at the moment of the loss be received, and therefore the contribution must be always uncertain; and yet in *Da Costa v. Newnham* freight was determined to be contributory. It is therefore not a decisive argument against its being contributory that the thing does not exist in certainty at the time of the loss. The next argument is, that this insurance is not co-extensive with the charter-party, and that the question is to be taken as if the underwriter had been called upon for his indemnity at the time when the voyage insured ended. But suppose in this case there had been an insurance upon the homeward voyage, what difference would it have made whether the voyage out and home was insured. If it is once established that freight is contributory, the freight saved must equally contribute to the general average, whether the policy be upon the whole or only part of the voyage.

BAYLEY J. Where part of a cargo is sacrificed for the preservation of the rest, it becomes a subject of general average, and all the parties whose property is thereby preserved are to contribute. Here the plaintiff had a

vested right of freight; he had some freight then actually due, and the whole was put in hazard, and the whole has been ultimately earned. The difficulty raised in argument is this, that a thing is not to contribute unless ultimately saved, and that it was uncertain at the termination of the outward voyage whether the freight would be saved; but this freight was one entire and indivisible sum payable for the use of the ship out and home; therefore when ultimately earned, having been put in hazard and saved, it ought to contribute.

Per Curiam,

Judgment of nonsuit.

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DOE, on the several and joint Demises of JOHN HENRY ROAKE, THO. WM. ROAKE, GEORGE ROAKE, and ELIZABETH ROAKE, *against* NOWELL. (a)

Tuesday,
May 11th.

EJECTMENT for a messuage, and other premises.

At the trial before Lord *Ellenborough* C. J. at the last summer assizes for the county of *Surrey*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Sarah Trymmer being seised in fee of the premises in question, by her will, dated the 6th day of *June* 1783, after making (amongst other things) a specific bequest to *John Roake*, her nephew and heir at law, directed the remainder of her personal estate not then invested in government funds, *India* stock, or annuities, to be forth-

Devise of all the testator's freehold estates to *J.S.* for life, and on his decease to and among his children equally, at the age of 21, and their heirs, as tenants in common; but if only one child shall live to attain such age, to such child and his or her heirs, at his or her age of 21; and in case *J. S.* shall

die without issue, or such issue shall die before 21, then over: Held that the children of *J.S.* took a vested remainder.

(a) This case was argued at Serjeants Inn.

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with laid out by her executors in the purchase of government securities, and the dividends and interest thereof, as also of all stocks, funds, or annuities which should be standing in her name at her decease, to be from time to time received by them, and paid to her said nephew *John Roake* for his life, and at his decease the whole principal dividends and interest of such stocks, funds, or annuities to be paid and transferred by her executors to the lawful children of *John Roake*, at the age of twenty-one, equally; but if only one should attain such age, to such only child at such age: and if her said executors should think proper, they were at liberty to apply such part of the dividends and interest of such stocks, funds, or annuities as their judgment should direct them towards the maintenance and education of such children or child till twenty-one; and if *John Roake* should leave no child or children lawfully begotten at his death, or they should all die before *John Roake*, or the attaining the age of 21, then she gave the whole principal dividends and interest of such stocks, funds and annuities, to and among her nephews *Miles, Thomas, John* and *James Pinfold*, and her nieces *Sarah Pinfold* and *Susannah Longman*, or such of them as should be then living. The testatrix then devised as follows: "I give and devise all my freehold estates in the city of *London*, and county of *Surry*, or elsewhere, to my said nephew *John Roake* for his life, on consideration that out of the rents thereof he do from time to time keep such estates in proper and tenantable repair, and on the decease of my said nephew *John Roake*, I devise all my said estates (subject to and chargeable with the payment of thirty pounds a-year to *Ann*, the wife of the said *John Roake*, for her life, by even and quarterly payments,) to and among his children lawfully

*fully begotten, equally, at the age of 21, and their heirs, as tenants in common. But if only one child shall live to attain such age, to him or her, and his or her heirs, at his or her age of 21; and in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before 21, then I devise all the said estates (chargeable with such annuity of 30*l.* a-year to the said Ann Roake for her life, in manner aforesaid,) to and among my said nephews and nieces, Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns for ever."* The testatrix died on the 4th of *December* 1786, without having revoked or altered her will, leaving *J. Roake*, the devisee, her heir at law, her surviving. *J. Roake* was then a widower, and had not any issue; and on the testatrix's decease, he entered upon the premises. On the 10th of *May* 1787 he married, and afterwards had the four lessors of the plaintiff, his only children; and in *Michaelmas* term 1789 levied a fine sur conuzance de droit, &c. of the premises, with proclamations to the use of himself in fee, in pursuance of a covenant contained in an indenture made on the 5th of *November* in that year. Two of the lessors of the plaintiff were born before the execution of the indenture and levying the fine above mentioned. In *Trinity* term 1797 *J. Roake* also suffered a recovery of the premises to the use of such persons as he should appoint, and on 21st *May* 1802, by deeds of lease and release appointed the same to the defendant in fee. *J. Roake* was in possession of the premises, as devisee under the will at the date of the said indenture and fine, and died on the 13th of *February* 1803, leaving the four lessors of the plaintiff him surviving, being then all infants under the age of twenty-one years. The two first lessors of the

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plaintiff have since attained their respective ages of twenty-one years, subsequently to which and before the date of the demises in this ejectment an actual and formal entry was made by the plaintiff's lessors respectively upon the premises in question for the purpose of avoiding the operation of the fine and recovery.

The question for the opinion of the Court is, What interest (if any) the lessors of the plaintiff, the children of *John Roake*, or any of them, take under *Sarah Trymmer's* will? and whether the fine or recovery has barred their title?

Marryat for the plaintiff, contended, that under the devise "to and among the children of *J. Roake* equally at the age of 21, and their heirs," the lessors of the plaintiff took a vested remainder in fee, liable to be divested by the contingency of their dying under the age of 21: and so he said it was resolved in several cases; viz. in *Boraston's case* (a), in *Edwards v. Hammond* (b), and in *Bromfield v. Crowder* (c), in the two latter of which, the words founded more in contingency than in the present case; for the word *if*, which was there used, is *primâ facie* a word of condition (d); and yet it was held in the one which was a surrender, and in the other which was a devise, to *J. S.* in remainder if he shall live to attain 21, that *J. S.*, who was then an infant under 21, took a vested estate. And the same rule was adopted in *Goodtitle v. Whitby* (e), and *Doe v. McCore* (f). And if the Court should hold otherwise in this instance, the freehold would pass in a different direction from the

(a) 3 Rep. 19. (b) 3 Lev. 132. 2 Show. 398. 1 N. R. 324. in notis.

(c) 1 N. R. 313.

(d) Co. Lit. 204.

(e) 1 Burr. 228.

(f) 14 East, 601.

personal property, which would be manifestly against the intention of the testatrix. Neither was it consistent with her intention of providing for the family of *J. Roake*, that if *J. Roake*, who had no children at the date of the will, should die before any of his children should attain 21, they should be altogether excluded; or that those who had attained that age should take to the exclusion of those who were below it. If that were so, then if *J. Roake* had died, leaving 20 children all under the age of 21, the estate would notwithstanding have gone over. Besides the ultimate limitation over in case *J. Roake* should die without issue, or such issue should die under 21, clearly imports that the limitation was not to take effect until both those events concurred, and therefore if *J. Roake* died leaving issue, such issue should take, although under 21. It is clear therefore that the intention of the testatrix was to give to all the children of *J. Roake* a vested interest, and the circumstance of their not being born at the time of her death will make no difference, because each would take the moment he came in esse; and therefore the words "at the age of 21" shall be construed as not importing a condition precedent to the vesting of their estate, but a condition subsequent, on the failure of which their estate shall be divested; not as a description of the time when the children are to take, but of the time when the estate already vested in them is to become indefeasible. Under this view of the case it becomes unnecessary to notice what the effect of the fine and recovery might otherwise have been.

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Preston for the defendant. The ultimate limitations both of the real and personal estate, which are made to depend upon *J. Roake's* dying without children, or such

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children dying under 21, are clearly contingent; and therefore shew that the testatrix contemplated contingencies. And so it is with respect to the prior limitation to the children of *J. Roake*; and there is no need for a difference of construction as to the devise of the real and personal estate. What would create a contingency in the one will do so in the other. Thus a legacy to *A. when* or *at* 21 is clearly contingent; although if it be given to *A. to be paid* at 21, it is not so (*a*); because that is construed as *debitum in præsentis solvendum in futuro*. The same rule applies to real estate; therefore a devise to a woman when she shall marry (*b*), or to *J. S.* when he came to the age of 25 years (*c*), has been holden to be contingent. Now here the question is, whether the testatrix intended that the children should have the remainder immediately, or whether the words which refer to the age do not import that they must arrive at that age before they can take. If they do, then the destruction of the particular estate before the time of the remainder vesting, will prevent its vesting at all. This question is not determined by *Bromfield v. Crowder*, because here the devise is not simply “to the children at 21,” which would then have resembled that case, but it goes on, “but if only one child shall live to attain such age, to that one child at 21:” so that taking the whole together, it is in substance a gift to such child or children upon condition of attaining 21. It is descriptive of the character in which the children must stand before they can take; not an immediate gift to the children as they are born, but to such child only as shall attain 21; and if it is contingent as to any one

(*a*) *Burr.* 227. per Ld. Mansfield.

(*b*) *Sir T. Ray.* 82. S. C. 1 Sid 153.

(*c*) 10 *Rep.* 50. *Grant's case.* *110. Eliz.* 122. *Johnson v. Gabriel.*

child attaining 21, it must be so to all, for it cannot first vest in all the children, and then be divested, so as to give it to such child as shall attain 21. As to *Boraston's* case, and the other cases that have been cited, they all turned upon the intention of the testator as it was collected in each particular case, and therefore cannot govern the present: but the intention must first be ascertained, and when once that is done, it is easy to apply the rule of law. Looking then to the words of this will, the fair import of them seems to be this, that the children should not take until they attained 21, and the devise being coupled with a bequest of the personalty in the same terms, the rule *noscitur a sociis* will apply. In *Doe v. Scudamore* (a), and *Denn v. Bagshaw* (b), the words were held to create contingent remainders.

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Marryat in reply. A devise to a person when he shall marry, is contingent; but a devise to a man when he shall attain 21, cannot be shewn by any case to make a condition precedent; but the contrary has been shewn by several cases. The rule respecting bequests of personal estate is borrowed from the civil law, and does not apply to devises of land, or bequests of legacies chargeable on land, in which cases the adverbs "when or at" do not amount to a condition precedent. As to the distinction taken between this case and *Bromfield v. Crowder*, it has no foundation; the devise there was to an individual if he should live to attain 21, which is the same as the devise here to one child, if only one should live to attain that age; the meaning of which is, that the attaining that age whether by one or more shall preclude the subsequent limitation. *Doe v. Scudamore* was clearly

(a) 2 *Eof. & Pul.* 289.(b) 6 *T. R.* 512.

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a case of contingent remainder ; but Lord *Eldon* there said, that a condition is to be construed to be precedent or subsequent according to the intent of the testator. Here it is apparent what that intent must have been.

Lord ELLENBOROUGH C. J. I think this case concluded by *Bromfield v. Crowder* ; which was very fully considered. That was a devise in remainder of all the testator's estate to *J. D. Bromfield*, if the said *J. D. B.* should live to attain the age of 21, but in case *J. D. B.* died under 21, and *C. Bromfield* should survive him, then over : and it was resolved that *J. D. Bromfield* took a vested estate determinable upon the contingency of his dying under 21. After that decision came the case of *Doe v. Moore*, which was an immediate devise of the testator's real estate in fee to *J. Moore*, when he attained the age of 21, but in case he died before 21, then to his brother, &c. : and there it was held that *J. Moore* took a vested estate. So that it appears whether the devise be in remainder or an immediate devise, there is no substantial distinction. Here the words of the devise, after the decease of *J. Roake*, are to and among his children equally at the age of 21, but if only one child shall live to attain such age, to such child at the age of 21 ; and in case *J. Roake* shall die without issue, or such issue shall die before 21, then over. I see nothing in this devise to distinguish it from the above cases. The consequence is that the children must be considered as taking vested remainders.

Per Curiam,

Postea to the Plaintiff.

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MULLER and Another, Assignees of MEEK, a
Bankrupt, against Moss. (a)

Thursday,
May 12th.

TROVER for pictures, prints, household furniture, and farming stock, &c. Plea, general issue.

At the trial before *Le Blanc J.*, at the spring assizes 1812, for the county of *Lancaster*, a verdict was found for the plaintiffs, damages 1112*l.* 17*s.* 6*d.*, subject to the opinion of the Court on the following case :

On the 22d of Nov. 1810, *Meek* (who was at that time a broker at *Liverpool*, in partnership with one *Gill*;) by agreement of that date, made between himself and the defendant, agreed with the defendant, on payment to him of 9500*l.*, to surrender to the defendant, his heirs and assigns, a dwelling-house and land, being copyhold of the manor of *Waventree*, then in *Meek's* possession, and lately purchased by him from one *Bolton*, together with the additional buildings, and to convey to him and deliver up possession of a pew in the church, and also all the household furniture and stock enumerated in the said agreement, and to be comprised in an inventory to be made by *J. S.* on behalf of the defendant, for whom *J. S.* should take possession, and to be signed by *Meek*; and it was agreed that *Meek* should afterwards be allowed to remain in possession for three months without payment of rent, he engaging to use carefully, and to deliver up the same in good order; and that the defendant should pay to *Bolton* the balance due to him from *Meek* on the original purchase, and the remainder of the purchase-money in acceptances of Messrs. *Meek* and *Gill*, or bills indorsed by them, if the defendant held so much,

Where, by agreement between *B.* and the defendant, *B.* agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver possession of all the household furniture and stock, and that after formal possession delivered to the defendant, *B.* should be allowed to remain in possession for three months without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and *B.* afterwards left in possession according to the agreement, who became bankrupt whilst he so remained in possession, and before the expiration of the three months: Held that this was not a possession by the bankrupt within the Stat.

21 Jac. 1. c. 19.
s. 11.

(a) This case was argued at *Serjeants' Inn*.

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and the remainder in good bills or cash; the whole to be calculated as cash of the present time; *Meek* to deliver an abstract of the title at his expence."

The agreement was signed on the day of the date, and the transfer was notorious in the neighbourhood and on the Exchange at *Liverpool* the day after it took place. On signing the agreement the defendant paid to *Meek*, in acceptances of *Meek* and *Gill*, and in bills which had their indorsement, 6847*l.* 5*s.* 11*d.*; which, with the balance of the purchase-money due to *Bolton*, and subsequently paid to him by the defendant, (which proved to be greater than the parties at first had calculated,) amounting to about 3200*l.*, exceeded the sum that the defendant was to pay under the contract by several hundred pounds. On the 27th of the same month of *November*, *J. S.* (mentioned in the agreement) met the defendant and *Meek* on the premises, for the purpose of making an inventory and taking formal possession of the purchased property for the defendant; which he accordingly did, and, in pursuance of the agreement, left *Meek* in possession of the whole premises except the wine-cellars, of which, after taking out a certain quantity of wine, by the desire of the defendant, for the consumption of *Meek* during his permitted residence in the house, the defendant received the keys, and has had them in his custody ever since. *Meek* continued in possession of the house, furniture, premises, and stock, pursuant to the agreement, until his bankruptcy, which took place within the three months, on the 24th *December* following. When the defendant was informed of the bankruptcy he sent a person to take possession, on his behalf, of all the property contracted for, and has kept possession of the same ever since. The assignees of *Meek* demanded the

4

furni-

furniture, pictures, prints, and stock, from the defendant, which he refused to deliver; and since the bankruptcy the assignees have conveyed the house to the defendant, pursuant to the agreement. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. If the Court should be of that opinion, the present verdict to stand: if of the contrary opinion, the verdict is to be entered for the defendant.

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Littledale contended, that the plaintiffs were entitled to recover, this being such a possession by the bankrupt as fell within the stat. 21 Jac. I. c. 19. §. 11. The property originally belonged to the bankrupt, and was suffered to remain in his possession after a conveyance of it to the defendant; so that the case falls within the preamble, as well as the enacting clause, of the statute, and does not admit of a doubt, which was formerly entertained, but since has been settled (*a*), whether the words of the preamble did not restrain the enacting clause. But it is fair to conclude that a case which is within the preamble is a fortiori within the meaning of the act. Then the bankrupt, by remaining in possession by permission of the true owner, became reputed owner, and gained a false credit, the mischief arising from which the statute was intended to obviate.

LORD ELLENBOROUGH C. J. It was a part of the contract that the bankrupt should remain in possession during the three months; therefore, during that period he was in of his own right, as owner, and not by permission of the true owner; and as to his being reputed

(*a*) *Mace v. Cadell, Cowp. 232.*

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owner, the case states that the transfer was notorious. No person was deceived. Besides, reputed ownership is a fact, which ought to have been found to raise the question at all. It might have been a very different thing, if the bankrupt had retained the possession without its being a part of the contract.

Per Curiam,

Postea to the Plaintiff.

Scarlett was for the defendant.

Tuesday,
May 11th.

BAYLY and Others, Assignees of LUCKRAFT, a
Bankrupt, against SCHOFIELD and Another.

Where a trader, upon being arrested for a debt of 135*l.*, escaped from the officer and fled into the house of another, and was pursued by the officer and inquired for at the house, but was denied and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and

THIS was an action for money had and received, tried at the *Lent* assizes for the county of *Devon*, 1812, before *Chambre J.*, when a verdict was found for the plaintiffs for 425*l.*, subject to the opinion of the Court on the following case:

On the 27th of *February* 1810, *Luckraft* being then a trader at *Plymouth*, and indebted to the defendants in the sum of 284*l.* for goods sold, the defendants drew a bill of exchange upon him of that date for the amount, payable at six months, which *Luckraft* accepted, but did

when it was dark returned home to his own house and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber: Held that this constituted one or more act or acts of bankruptcy, under the words of the statute, "beginning to keep house," or "otherwise absenting himself;" and a creditor of the bankrupt, who had sued out a writ against him, and, without proceeding upon it, afterwards received from him a bill of exchange in part-payment of his debt, after being apprised that there had been a meeting of his creditors, and that the bankrupt's affairs at that time were only capable of paying the demands of his creditors by instalments, although he was assured by the bankrupt's agent that they would come round, was liable to refund the proceeds of such bill to the assignees of the bankrupt, as a payment not in the usual course of trade, and before notice of his insolvency.

not pay when due. On the 1st of *June* following, *Luckraft* being then farther indebted to the defendants in the sum of 56*l.* 12*s.* 9*d.* for other goods, sent them a bill of exchange of that date drawn on *Harrison* for the last-mentioned sum, at five months, which bill not being accepted, the defendants' attorney wrote to *Luckraft* on the 26th of *July*, calling on him for payment, and desiring the amount to be remitted by return of post to prevent his farther interference. On the 9th of *August*, *Luckraft* being then indebted to the defendants and several other persons, particularly to one *Henry Wills*, in the sum of 135*l.*, was arrested at his suit, and taken by the officer who arrested him to a public house in *Plymouth*, at his own desire, but escaped from the officer at the door of the house. He was immediately pursued by the officer, but fled from him into the house of another person, into which the officer was certain that he entered, and enquired for him there, but he being denied by some one within the house, and the door kept fast, the officer did not break it open, but departed and did not see *Luckraft* afterwards, but the money for which he was so arrested was paid within three or four hours after by *Luckraft's* attorney. Afterwards on the same day *Luckraft* was seen by a person at the house whither he fled in a two pair of stairs room, to whom he said that he had been arrested on that day, and the debt was paid, but that he remained there for fear of being opposed by some other creditors. When it was dark he went home to his own house, and gave directions to deny him to any body that called, and from that time he continued nearly a month in his bed-chamber, except coming down on *Sundays* for a little air. On the 11th of *August* a commission of bankrupt issued against *Luckraft*, but it appearing afterwards to the

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the parties who sued it out that his property was far more than sufficient to pay all his debts, and that he only required time, it was not proceeded upon, but advertisements were published in two of the public newspapers for convening a meeting of his creditors on the 31st of *August*, which was accordingly held, when it was unanimously resolved by the creditors present, that *Luckraft*, with the assistance of his attorney, should forthwith advertise all his lands for sale, dispose of all his other effects as speedily as adviseable, collect all monies due to his estate, and divide the same proportionably amongst his creditors as the proceeds should come to hand. *Luckraft* and his attorney accordingly proceeded to carry this resolution into effect; by advertising the land and getting in as much of the property as possible, with which many payments were made to creditors in proportion to their respective debts. On the 22d of *August* *Luckraft's* attorney wrote a letter to the defendant's attorney, upon the subject of his letter to *Luckraft* of the 26th of *July*, demanding payment of the draft for 562*l.* 12*s.* 9*d.*, when he apprized him of the above advertisements in the newspapers, calling a meeting of the creditors on the 31st instant, and requested the defendants to depute some friend to attend that meeting on their behalf, stating that he hoped then to make it appear that *Luckraft's* debts were about 10,000*l.*, and his effects worth 14,000*l.*, and to obtain a licence for a few months to arrange his affairs, and pay every one 20*s.* in the pound. The letter also stated that *Luckraft's* principal property consisted in houses, all of which were more or less incumbered, and that the great difficulty or delay in settling his affairs would be in converting this property, as houses in *Plymouth* were then really
a drug,

a drug, but that every step would be taken to get rid of them, even at a sacrifice, in order to wind up the matter. On the 2d of *September* following *Luckraft's* attorney not having heard from the defendants' attorney, wrote to the defendants as follows: "So long since as the 22d *ult.* I
 " replied to your solicitor in answer to a letter which
 " my client, Mr. *Luckraft*, had received on the sub-
 " ject of the monies due from him to you, and
 " I stated that I had by advertisement called a meeting
 " of Mr. *Luckraft's* creditors in order to lay before them
 " a general state of his affairs, and as I hoped, and
 " which proved the case, to prove to them that although
 " he at this time labours under a temporary embarrass-
 " ment, yet that he still is a very solvent man. I flattered
 " myself I should have had your solicitor's reply, con-
 " taining your sentiments on the subject before the
 " meeting, as I had not, I now state to you, the situa-
 " tion of the affairs, and what took place at the meet-
 " ing, and have great pleasure in assuring you that I
 " was there enabled, most satisfactorily, to lay before
 " them a statement, (a copy whereof I now send you,)
 " which not only gave general satisfaction, but drew
 " from every one present (with the exception of one
 " gentleman, who was a mortgagee in possession for
 " about 700*l.*, and said he could not wait longer,) an
 " immediate consent to wait a few months, not exceed-
 " ing six, to enable Mr. *Luckraft* to sell his estates and
 " convert his other effects, and if necessary they would
 " all agree to execute a deed to that effect, but whether
 " such will be necessary is not at present determined.
 " The cause of Mr. *Luckraft's* embarrassment is a very
 " heavy and losing contract he has had for two years
 " past in the victualling office, to compleat which he

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“ has been obliged to take up sums on mortgage in
 “ all directions. The commissioners of the victualling
 “ office have, however, agreed to allow him about
 “ 1000*l.* in part remuneration of his losses. The re-
 “ mainder of the 3000*l.*, stated to be due to him from
 “ the victualling office will be forthcoming in three or
 “ four months. I am therefore to entreat your consent
 “ to follow the steps of the other creditors, and I have
 “ no doubt but in three or four months, or perhaps
 “ less, both you and every other creditor will be fully
 “ paid.” In reply to this letter the defendants wrote to
Luckraft's attorney on the 6th of *September*, acknowledg-
 ing its receipt, and stating that had *Luckraft's* conduct
 to them been that of a fair tradesman, they would not
 have hesitated to agree to any measures that might be
 beneficial to himself and the creditors, but as it was he
 could not expect much lenity from them; that they had
 come to a determination not to sign any deed of trust,
 nor to let the business stand over for some months, as
 requested, without security; that if *Luckraft* could fur-
 nish them with such security as they might approve, to
 pay his debt in six months from that time, they had no
 objection to wait so long, if not, the law should have
 its force, and he should hear from them accordingly.
Luckraft's attorney replied on the 27th of *September*,
 that he was sorry the defendants were not inclined to
 grant the indulgence requested, *that he pledged himself to*
them that there was no doubt that Luckraft would be able to
pay every one in full, and have a very considerable balance left;
 that he had been informed by his agent in *London*, that
 the defendants not only refused to receive 300*l.* on ac-
 count, *but threatened arrest*, he would therefore endea-
 vour to send them one half of their debt, or say 420*l.*

by return of post, provided they would be content to wait three months for the remainder, by which time he had not the least doubt he should be quite enabled to settle with them and every other creditor. By return of post *Luckraft's* attorney received a letter from a clerk of the defendants, informing him they were from home, and that his letter of the 27th would be laid before them on their return: the letter added, that more than a week previously to his agent's waiting upon them with the 300*l.*, they had taken out a writ against *Luckraft*. On the 2d of *October* the defendants' attorney wrote to *Luckraft's* attorney, that if he would remit 420*l.* and the costs, together with the undersheriff's and officer's charges by return of post, with *Luckraft's* note payable in *London* at three months for the balance and interest, they would accept it, that this offer was made, and must be accepted without prejudice to the defendants, if not complied with immediately. On the 11th of *October* *Luckraft's* attorney replied that he had been absent from home, and was only just returned, since which he had been endeavouring, if he could, to raise sufficient cash of *Luckraft* to remit the 420*l.* and costs, but had not been able to muster quite so much, having been obliged to pay every one a little as it came to hand, and as yet had paid no other creditor any thing like the proportion then inclosed for the defendants, that he had set aside 420*l.*, the produce of a navy bill, hoping it would have satisfied the defendants, and induced them not to take hostile measures, but of this step they were to judge, and although he regretted the expences of an original writ, he at the same time thanked them for staying proceedings. The letter then went on thus, "I now inclose you Messrs. *Symons* and Co.'s draft on *Stephenson* and Co. for

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“ 425*l.*, which is the most I can at this time muster,
 “ and I declare to you I have not the smallest doubt that
 “ within three months, from this time, I shall have suf-
 “ ficient cash pass through my hands to be able to re-
 “ mit you the full balance, and therefore shall consider
 “ you will not press us to incur the additional heavy ex-
 “ pences of special bail during the next term, as I have
 “ not a shadow of doubt but that e'er *Hilary* term ar-
 “ rives your clients will be fully paid.” The inclosed
 bill was dated the 11th of *October* 1810, payable thirty
 days after date, and was indorsed to the defendants,
 and the value for which it was drawn was part of the
 produce of *Luckraft's* estate, received by his attorney
 on his account, and paid by him to the drawers of the
 bill on the day of its date, as a consideration for the
 same, for the purpose of remitting it on *Luckraft's* be-
 half to the defendants. It was received by the defen-
 dants on the 13th of *October*, and was paid to them
 when due. On the 13th of *October* the defendants' at-
 torney wrote to *Luckraft's* attorney, desiring him to send
 the note required in his former letter for the balance of
 the debt and costs, and interest then due, as well as for
 the three months the note would have to run, upon doing
 which, and paying the officer's charges, the business
 would be settled. To this *Luckraft's* attorney replied
 on the 16th of *October*, that he could not send him the
 note payable in *London*, as required, but had inclosed
 him *Luckraft's* promissory note for 456*l.* 12*s.*, being the
 amount of the balance for principal and interest on both
 the bills of exchange, calculated to the 11th of *January*
 next, when the note would become due, and he re-
 quested him to return the bills of exchange, in lieu of
 which the inclosed note was sent. The letter further

stated that he had calculated the interest on the bill for 562*l.* 12*s.* 9*d.* from the day it was drawn, according to his suggestion, though in strictness no interest was due thereon till it became due, for it might be paid then, although acceptance had been refused; that he hoped, however, if it was regularly paid (as he expected), that the defendants would make some allowance to *Luckraft* on account of interest and costs. In pursuance of this letter the defendants' attorney returned the two bills. At the trial *Luckraft's* attorney was examined for the plaintiffs, and on cross-examination stated that at the time the bill of the 11th of *October* was paid to the defendants, he assured them that *Luckraft* was a solvent man; that he believed him to be so, and thought he would come round; and that under that representation the money was paid. On the 10th of *December* 1810 the former commission of bankrupt issued against *Luckraft* was superseded, and another commission dated on that day was issued against him on the petition of his attorney, to whom he was indebted in 700*l.*, (as was admitted in the outset of the argument, before the 9th of *August*,) under which commission he was duly declared a bankrupt, and the plaintiffs afterwards chosen assignees, and this action is brought by them to recover the said sum of 425*l.*, as money had and received by the defendants to their use as such assignees.

The questions for the opinion of the Court are, 1st, Whether under the above circumstances *Luckraft* committed an act or acts of bankruptcy before the defendants received the said 425*l.*: 2dly, Whether the said 425*l.* was under the above circumstances really and bonâ fide, and in the usual and ordinary course of trade

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and dealing, received by the defendants of *Luckraft* before such time as they knew, understood, or had notice that he was become a bankrupt, or was in insolvent circumstances. If the Court shall be of opinion in the negative upon the first question, or in the affirmative upon the second, then the verdict is to be set aside and a nonsuit entered, otherwise the verdict is to stand.

Bayly for the plaintiffs, contended* upon the 1st question, that *Luckraft* committed an act of bankruptcy on the 9th of *August*, by escaping from the custody of the officer, taking refuge in the house of another, and being there denied, whilst the doors were kept close. This he said was a "beginning to keep house" within the words of the stat. 1 J. 1. c. 15. and it makes no difference that the house where he was denied was not the house of the bankrupt; for in a case cited by *Buller J.* in *Colkett v. Freeman* (a), the denial was at the house of a friend; and yet *Lord Mansfield* held it would be sufficient to constitute an act of bankruptcy. The house in which the bankrupt shuts himself up and is denied, may be considered as his house for the time. And in like manner it was resolved in *Holroyd v. Gwynne* (b), that a trader by departing from a mere temporary residence committed an act of bankruptcy. [*Bayley J.* That was holden an act of bankruptcy under another branch of the statute, viz., "otherwise absenting himself."] At all events there was a "beginning to keep house," from the time that the bankrupt returned home and gave directions to be de-

(a) 2 T. R. 59.

(b) 2 T. R. 176.

nied, and afterwards continued shut up in his own house for nearly a month. An actual denial to a creditor is not necessary; if the trader secludes himself to avoid the importunity of his creditors, that will be sufficient, according to Lord *Ellenborough* C. J. in *Dudley v. Vaughan* (a). So in *Robertson v. Liddell* (b), and *Williams v. Nunn* (c), it was held that if a trader depart the realm, or from his dwelling-house, with intent to delay his creditors, those are acts of bankruptcy without proof of any actual delay. And the same doctrine holds as to "a beginning to keep house," because it satisfies the words, "to the intent or whereby his creditors may be delayed," which refer to all the other acts of bankruptcy before enumerated. 2dly, The payment was not in the ordinary course of dealing, neither was it before such time as the defendants had notice of the bankruptcy or insolvency of *Luckraft*: 1st, It was not in the ordinary course of dealing, inasmuch as the bill which was given in payment of the goods was renewed by another bill, which included interest from the day when the first bill was drawn, instead of the day when it became due; *Vernon v. Hale* (d), *Pinkerton v. Marshall* (e), and *Bradley v. Clarke* (f). With respect to the defendants having notice of the insolvency, the whole correspondence shews that they had notice that the bankrupt's property was under such embarrassments, that although ultimately it might prove sufficient, yet at the time it was unable to liquidate his debts: which is the very meaning of insolvency. As to the belief of the bank-

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(a) 1 Camp. N. P. C. 272.

(b) 9 East, 487.

(c) 1 Taunt. 270.

(d) 2 T. R. 648.

(e) 2 H. Bl. 334.

(f) 5 T. R. 127.

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rupt's attorney, it could have no weight when opposed to the facts which were communicated to them.

Burrough, contra. Neither of the acts relied upon as acts of bankruptcy, fall within the meaning of the words "beginning to keep house." As to the first it does not appear that the denial to the officer at the house to which *Luckraft* fled, was made in consequence of any directions given by him; and as to the second, although when he returned to his own house he gave directions to be denied, it is not stated that any creditor called, so that there was no actual denial, which is the usual evidence of a beginning to keep house. Nor have the words of the statute "otherwise absenting himself," been extended to a case like the present. The other question which turns upon the 19 G. 2. c. 32. is perhaps more properly a question of fact than of law: that the debt was originally contracted in the ordinary course of trade there can be no doubt; and according to the cases of *Calvert v. Lingard*, *Holmes v. Wennington* (a), and *Cox v. Morgan* (b), the payment may be considered so also; for it was a payment by compulsion, and as such protected by the statute. And although in *Cox v. Morgan*, *Chambre J.* differed from the other Judges, yet he admitted the authority of the preceding cases.

Bayly in reply. In *Cox v. Morgan* the creditor used due legal diligence in obtaining his debt, by commencing an action against the bankrupt and arresting him, and that was the point on which the decision turned.

(a) 2 Bos. & Pul. 399. n.

(b) 2 Bos. & Pul. 398.

No such diligence was used in this case, but on the contrary, time was given for payment, and interest taken by way of premium for the indulgence. That decision therefore does not apply; and in *Hovil v. Browning* (a), Lord Ellenborough C. J. said that if that case had been the same as *Cox v. Morgan* he should have inclined to the opinion of *Chambre J.*

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LORD ELLENBOROUGH C. J. There are two points in this case referred to the consideration of the Court. The first, whether *Luckraft* committed an act of bankruptcy on the 9th of August 1810. The facts respecting that point are these; that *Luckraft* was arrested upon process against him and taken to a public house, but escaped and fled from the door to another house, where he was denied, but not by his orders; and therefore that circumstance should not be pressed. He remained however in the house until dark, intending to delay his creditors. I think this was not a departing from his dwelling-house, but that it was emphatically an absenting himself within the words of the statute. Then comes a second act; when dark he returned home, the next day gave orders to have himself denied, and there continued nearly a month in his chamber. Indeed it has not been much contended that the act of bankruptcy is not made out. The next question, and the most important one, is, whether the payment by *Luckraft* was a payment *bonâ fide* and in the usual and ordinary course of trade, within the 19 G. 2., before such time as the defendants had notice that he was become bankrupt, or was in insolvent circumstances. It may be admitted that they did not

(a) 7 East, 162.

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know that he was a bankrupt, but how does the case stand with respect to their knowledge of his being in insolvent circumstances? By insolvent circumstances is meant that a person is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. Looking at the letter of the 11th of *October* which inclosed the bill, it emphatically shews him to have been in insolvent circumstances. It speaks of his being unable to muster a sufficient sum, and of his having been obliged to pay every one a little as it came to hand. Can that payment then be said to be in the ordinary course, when a man confesses he is obliged to pay by minute portions to each of his creditors? It is more like a distribution under a deed of composition, than a payment by a trader appearing openly at his counter. I should say that this was not the mode in which a solvent man proceeds. But we have been pressed by arguments to shew that this is a case where legal diligence was used to enforce payment. That case has been so much considered, and decided by so many Judges, that I should be sorry to say any thing which might seem to cast a doubt upon it. But it is an exception, and may be considered as an anomalous case. I do not lay much stress on the circumstance of paying interest, because a man who is solvent may very fairly pay interest; as for instance, where goods are sold upon credit, and the money not paid until after the time of credit is run out, interest may be paid for such time as the credit has been exceeded. I therefore do not think the circumstance of paying interest weighs much on one side or the other; it does not import insolvency except as far as the not paying at the proper time may be deemed a circumstance of insolvency. What I principally rely on is the actual state of incapacity to pay except in small portions,

portions, by mustering as much as could be raised out of the ordinary course. In *Southey v. Butler* (a), where a trader who was detained in prison for debt, sent for his creditors and paid them all in full except one, it was held that such payment was not in the ordinary course. Neither do I think this was: here the debts were not paid in full; and although I do not rely on the payment of interest, yet it is an ingredient to shew it not in the ordinary course. With respect to the opinion of *Luckraft's* attorney, that he believed him to be solvent, and that he would come round, the very term "come round" imports that he was not then solvent; besides if it were otherwise, his belief can have no weight when opposed to the letters.

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GROSE J. I am of the same opinion. There were clear acts of bankruptcy committed on the 9th of *August*, and on the following day, by the bankrupt's secreting himself within his own house. With respect to his being in insolvent circumstances, it is true indeed that the attorney stated that he believed otherwise, but his letters upon that subject pronounce judgment against himself, shewing that the bankrupt was infinitely distressed. As to the money having been paid in the usual and ordinary course of trade, I cannot say that money paid by dribblets by a person who felt himself to be insolvent was such a payment. Then as to the knowledge of the party who received the money, looking at the correspondence, it is impossible to doubt whether he was ignorant of it.

LE BLANC J. This is an action brought by the assignees of *Luckraft* against the defendants to recover

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from them a sum of money which they received as the produce of a bill remitted to them by the bankrupt after his bankruptcy. The first question is, whether a previous act of bankruptcy had been committed; and then comes the question, whether the money was paid in the ordinary course of trade, and before the party who received it knew of the insolvency. With respect to the act of bankruptcy the facts are these; on the 9th of *August Luckraft* was arrested, but escaped to the house of another, where he shut himself up, so that the officer arresting could not get access to him. He staid there during the remainder of the day expressing his fears of encountering other creditors. When dark he returned home, and gave directions to be denied, and confined himself nearly a month in his bedchamber, with exception of *Sundays*. There was no evidence of any actual denial, but a denial is not one of the acts of bankruptcy enumerated in the statute. It has indeed been received as conclusive evidence, if unexplained, of an act of bankruptcy, by beginning to keep house; but it is not the only evidence by which an act of bankruptcy may be established. It may be proved also by evidence of his absenting himself, or of his keeping his house with intent to delay his creditors; as in this case, when upon his return home, he explained his motives for shutting himself up in his bedchamber. There is no doubt therefore that upon one or both of these grounds an act of bankruptcy was committed. That brings it to the next question, whether the payment was protected as being a payment in the ordinary course of trade, and without knowledge of his insolvency. I should feel great difficulty in saying that this was in the ordinary course. The defendants were creditors upon a bill of exchange, which being dishonored,

honored, they applied for payment, and afterwards sued out process, but did not enforce it by arresting *Luckraft*, but commenced and continued a correspondence from the 22d of *August* to the 16th of *October*, and on the 13th of *October* received the bill in question in part payment of their debt. During that period the bankrupt's attorney was in the course of informing them of the situation of his affairs. The question is, whether he was not then insolvent. I take insolvency as it respects a trader to mean that he is not in a situation to make his payments as usual ; and that it does not follow that he is not insolvent, because he may ultimately have a surplus upon the winding up of his affairs. The letter of the 22d of *August* refers to the advertisement in the newspapers respecting the bankrupt's affairs, and respecting a meeting of his creditors, so that on that day the defendants were apprized of those circumstances. That information was followed up by an account of what passed at the meeting. The defendants still go on until the 13th of *October* without enforcing their demand by service of process, and are in that interval informed that the bankrupt is paying money to his creditors in driblets. They then receive the bill in question for part of their debt. I find great difficulty therefore in saying that this was a payment in the ordinary course of trade. There is much greater difficulty however in saying that the defendants did not know *Luckraft* to be insolvent. They were from time to time informed of his affairs ; and the only expectation of his solvency that was held out to them, arose from a speculation of disposing of his houses to advantage ; and the opinion of his attorney only amounted to this, that by management his affairs would come round ; but that does not make a man who is unable to pay his creditors at the time a solvent man.

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BAYLEY J. I entirely agree with my Brothers. When *Luckraft* escaped from the officer, and fled to the house of a stranger, and there remained until dark, I consider that as an absenting himself within the meaning of the statute, and a complete act of bankruptcy. It seems to me also that when he returned home and remained in his bedchamber for upwards of three weeks, that amounted to another act of bankruptcy. An actual denial to a creditor is not essential to constitute an act of bankruptcy by beginning to keep house. In many cases indeed the conduct of the bankrupt is equivocal, and therefore it may be necessary to shew an actual denial, but where there is any other distinct and independent act of beginning to keep house, it is not necessary to follow it up with the additional circumstance of a denial. I remember in the case of *Castell's* bankruptcy^(a) it was proved that the bankrupt left the place where he usually sat, and retired into a back room up stairs, and drew the curtains, in order to prevent his being seen; and that was considered a sufficient act of bankruptcy. As to this being a payment in the ordinary course of trade, the object of the statute was to protect those persons only who received money under circumstances not calculated to raise suspicion; but if any such circumstances occur, then they receive the money at their peril, and are liable to refund. Now here the defendants were apprized that the bankrupt was indebted to other creditors to a large amount, and that he was under a general inability to make good his payments to any of his creditors, and that time was essential to him to enable him to arrange his affairs; and that when payments were made they were in part only of the debts. I agree with my Brother *Le Blanc* that insolvency means that a trader is not able to keep his general days

(a) *The King v. Babb and Others.*

of payment; and that he is not to be considered as solvent because possibly his affairs may come round.

Postea to the Plaintiff.

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ELIZ. KINGDON, Executrix, &c. against NOTTLE. Tuesday, May 11th.

THIS action was brought by the plaintiff, as executrix of *Richard Kingdon*; and the declaration stated, that by indentures of lease and release of the 11th and 12th of May 1780, the defendant conveyed to *R. Kingdon* in fee a 4th part of certain lands therein particularly described, with a proviso for redemption upon payment of 450*l.*; and that the defendant covenanted for himself, his heirs, executors, and administrators, with *R. Kingdon*, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee simple: and that he had good right to convey the same to *R. Kingdon* and his heirs: and farther, that the defendant would from time to time, upon every reasonable request of *R. Kingdon*, his heirs or assigns, but at the defendant's costs, execute any farther conveyance for the purpose of assuring and confirming the premises to *R. Kingdon*, his heirs and assigns; and then the following breaches were assigned: first, that the defendant was not seised in fee at the time of the execution of the indenture: secondly, that the defendant had not at that time good right to convey: lastly, that the plaintiff, as executrix after the death of *R.*

Where the plaintiff, as executrix, declared that the defendant, by deed, conveying to the plaintiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator that he was at the time of the execution of the deed seised in fee, and had a right to convey, &c.; and assigned for breach that the defendant was not seised, &c., and had not a right to convey, &c.: this was held ill upon special demurrer, and that the executrix could not maintain an action for such breaches of covenant, without shewing some special damage

to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Covenant upon request of the testator, his heirs or assigns, to make further assurance to the testator, his heirs and assigns, and breach assigned that the plaintiff, as executrix, requested the defendant to execute a release between the defendant, the plaintiff, and *S. A.*, for farther assuring the premises to the uses mentioned in the deed, which the defendant refused; without shewing that the plaintiff claimed an interest, or to whose use the release was to enure, or why *S. A.* was a party to it; was considered ill on special demurrer. A demurrer for cause of misjoinder of breaches of covenant must be to the whole declaration, and not to the breach alone which is misjoined.

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Kingdon, made a reasonable request to the defendant to execute an indenture between the defendant of the first part, the plaintiff of the second part, and *Samuel Anstice* of the third part, intended to be a release of the premises for suffering a common recovery for the better assuring and confirming the premises to the uses mentioned in the deed; and tendered the same to the defendant for execution, but the defendant refused to execute. The defendant demurred to the first and second breaches, assigning for causes that they are assigned too generally, and are not sufficiently precise and certain, and that it does not appear that *R. Kingdon* sustained or could have sustained any damage by the said breaches of covenant, or either of them, nor that he was at any time interrupted or disturbed in his enjoyment of the premises conveyed to him by the defendant; nor that the said *Elizabeth* has or claims any interest in the premises, or that she is heir at law, or assignee of the same, or any part thereof. He demurred also to the last breach, assigning for causes, that it does not appear that the said *Elizabeth* hath or claims to have any interest in the premises, as assignee or otherwise, of *R. Kingdon*, nor to what person, or for whose use the deed of release was intended to enure, or why or for what reason *Samuel Anstice* was made a party thereto, nor that the said deed of release was a reasonable conveyance or assurance in that behalf: and also for that the said lastmentioned breach of covenant cannot by law be joined in the same declaration with the other breaches of covenant in the said declaration assigned: and also for that the said declaration as to the said breach of covenant lastly assigned is in various other respects insufficient, informal, and defective. Joinder.

Gifford in support of the demurrer, took two grounds of objection, which went to the whole declaration. First, that the executrix cannot maintain an action on this covenant; but the heir shall have it or the assignee of the land. Secondly, supposing this action maintainable, there is a misjoinder; the two first breaches assigned being breaches which accrued in the time of the testator; the last in the time of the executrix. Upon the first point, which was the principal one, he said that there were two sorts of covenants, viz. real or such as are annexed to and run with the land, and these descend to the heir, and he alone shall take advantage of them; and 2dly, covenants personal, of which the personal representative shall take advantage. The present falls within the former description of covenants; for notwithstanding the proviso for redemption, this conveyance is in substance a conveyance in fee; and the covenant for title and farther assurance is annexed to the land, and will pass to the heir or the assignee of the land. And although the covenant be with *R. Kingdon* alone, without naming his heirs, still if it run with the land it shall go to the heir, although he be not named; *Lougher v. Williams.* (a) Then if in breach of this covenant a good title be not made, the heir, after the death of the ancestor, is thereby damnified, and consequently he is the person entitled to sue, and not the executrix; for that would be converting real into personal assets. In *F. N. B.* 145. C. it is laid down thus: "If a man make a covenant by deed to another and his heirs, to infeoff him and his heirs of the manor of *D.*, now if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of

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(a) 2 Lev. 92.

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covenant upon that deed." And this is very material to the present question, because the principle to be deduced from it is this, that notwithstanding there be not any conveyance of the land to which the covenant may be annexed, but the whole rests in covenant merely; yet when it is a covenant which regards the inheritance, it shall enure to the benefit of the heir. And the case there put carries the principle farther than the present case requires, where there is a conveyance of the inheritance with which the covenant will run. The same doctrine will be found in *Shepherd's Touchstone*, 171. "If a feoffment be made in fee, and the feoffor doth covenant to warrant the lands, or otherwise, to the feoffee and his heirs; in this case the heir of the feoffee shall take advantage of this. As if *A.* covenant with *B.* and his heirs to infeoff *B.* and his heirs of land, and *B.* die before it be done, in this case his heirs shall take advantage thereof." [Lord *Ellenborough* C. J. It says the heirs shall, but it does not say the executor shall not. Suppose an action brought by the heir, and then by the executor, what plea could the defendant plead? Is there any case which negatives the right of the executor?] No case has been found to that effect: but in *Bacon's Abr.* (a) it is said, that covenants real descend to the heir, and he alone shall take advantage of them. It is farther laid down in *Shep. Touch.* 171. that "if *A.*, *B.*, and *C.* have lands in coparcenary, and purchase other lands in fee, and covenant each to the other, his heirs and assigns, to make such conveyance to the heir of him that shall die first, of a third part, as he shall devise: in this case the heir, not the executor, shall take advantage

(a) *Bac Abr.* tit. *Covenant*, E.

of the covenant." And this seems to have been the case of *Wootton v. Cooke* (a), where it was so adjudged on error, notwithstanding it was objected that the heir could not have an action as heir, except in respect of a right, or thing descended from his ancestor, and not when nothing descended, as in that case; for there (as it was said) the action was not brought to recover any thing descended, nor any inheritance, but damages only: but it was resolved by all the justices that the heir should have the action, for that the intent of the covenant was to have the inheritance conveyed to the heir, and if that covenant had been performed, the heir would have had the advantage of whatever by the performance of the covenant would have accrued to him, and therefore he should have the damages which accrued by the non-performance of the covenant." The same argument applies immediately to this case. Then it may be further objected, that if this action be maintainable by the executor, an executor might recover damages even to the full value of the land; and such damages would become a part of the personal assets, and be distributable as such; and then the heir might also bring an action, and it would be difficult for the defendant to frame a plea which would be a bar to such action; for how could he plead a former recovery by the executor of damages which would be personal assets, to satisfy the damages accruing to the heir by the breach of covenant? Then the covenant as set out in the declaration is with *R. Kingdon* alone, without naming his executors; so that the plaintiff has not even a color for bringing this action: for if the executor had been named, it might have been said that he was a party to the covenant, although even then, according to the case of

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(a) *Anderf.* 53.

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Lougher v. Williams, the heir would still have been the person entitled to maintain the action; but now that he is not named he is neither privy in contract nor in interest. At the common law the heir or executor of a man seised of a rent service or rent charge, &c. in fee or in tail had no remedy for the recovery of the arrearages incurred in the lifetime of the owner of such rent; the heir could not maintain debt for them, for he had nothing to do with the personal contracts of his ancestor; and the executor could not, because he did not represent his testator as to any contracts relating to the freehold and inheritance; but this is remedied by stat. 32 H. 8. c. 37. (a) Now change only the above instance of rent into the covenant in this case, and it will be found that there is the same reason here why the executor should not maintain this action. He was then proceeding to the second ground of objection, when *Bayley J.* inquired whether if the last breach was badly assigned it would operate as a misjoinder: to which it was answered, that a bad count in a declaration may nevertheless be cause of misjoinder. But the Court said, that then the demurrer for cause of misjoinder should have been to the whole declaration, and not as here to the last breach of covenant only; and upon this the argument proceeded no farther.

Bayly contra, admitted the last breach could not be supported, for the reasons assigned in the demurrer, (and the Court agreed to that); but upon the principal point he urged, first, that this was only a mortgage, and not a conveyance of the inheritance: but the Court said that they would look to it as a conveyance of the fee, subject to a

(a) Co. Lit. 162, & Bac. Ab. Debt C.

power of redemption, which had not been exercised. He then contended that no case had been cited for the defendant, in which upon the same covenant as the present, the executor has been held not competent to sue : but many cases are to be found, where upon similar covenants, actions have been permitted to be maintained by him. Thus the case of *Lucy v. Levington (a)*, (which is also an answer to another part of the argument, that the executor is not named in the deed,) decided that the executors, although not named, might sue upon a covenant for quiet enjoyment made with their testator, and the reason given was because they represent the person of their testator. [*Bayley J.* There was another reason also for that decision, viz., that unless the executors could sue in that case, no other person could, because the testator having been evicted in his life-time, it was said that he could not have heirs or assigns of that land.] Here also there was a breach of the covenant (for it was broken as soon as made,) in the testator's life-time, and the damages arising from it could not descend ; and therefore the executor is the only person who can sue for them. And this is commonly allowed to be done by the executor upon covenants for not repairing. In both cases the breach of covenant at the very time of its commission, renders the estate of less value in the hands of the testator than it would otherwise have been ; it would sell for a less price : therefore this was an immediate damage to the testator, and although it is said that now it has become the damage of the heir alone, non constat that his ancestor may not have compensated him in some other way for such deterioration of the estate. In

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(a) 2 Lev. 26. 1 Ventr. 175. S. C.

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Lucy v. Lewington it is true there was an eviction, but that is not necessary to constitute a breach of covenant for good title; in *Salmond v. Bradshaw (a)*, there was no eviction, but the breach assigned was, that the defendant had not full power to demise; and it was holden to be well assigned. [*Bayley J.* Here if it had been alleged that the testator was prevented from selling, perhaps the executor might have maintained the action.] The covenant is alleged to have been broken in the life-time of the testator, and in the last cited case it was held that where the covenant is general, the breach may be assigned as general as the covenant. [*Lord Ellenborough C. J.* The covenant, it is true, was broken, but there was no damage sustained in the testator's life-time. It has been a sort of maxim in the law, that an executor so far represents his testator, as to be entitled to maintain an action in respect of all personal contracts made with the testator, and broken in his life-time: but from *Co. Litt.* and the other authorities which have been cited, it should seem that in contracts relating to the freehold, the executor does not represent his testator quite to that extent. And if the present action could be maintained, this inconvenience would certainly result from it, that the executor who could recover only nominal damages, would thereby preclude the heir, who is the party actually damnified, from recovering at all; for I am not aware of any case in which an action has been holden to be maintainable by the heir, after a former recovery by the executor.] As to the case of *Wootton v. Cooke*, there was not any breach, as in this case, in the life-time of the testator.

(a) 9 Rep. 60. b. Cro. Jac. 304. S. C.

Gifford in reply. In the case of *Lucy v. Levington*, which indeed has already received an answer, there was an eviction alleged in the life-time of the testator, and nothing passed to the heir. Here, for any thing that appears to the contrary, the land has descended to the heir. The question then is, whether the executor who has shewn no damage is to recover in exclusion of the heir who is damnified, or whether both may recover against the defendant. No authority has been shewn for that, and it would be novel to hold that two actions may be maintained on the same breach of covenant.

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LORD ELLENBOROUGH C. J. This is a case in which a person may have formed his opinion from what is to be found in a book of very excellent authority, I allude to *Comyns Digest* (a), in which it is laid down generally that if a man covenant with *B.* upon a grant or conveyance of the inheritance, his executor may have covenant for damages upon a breach committed in the life-time of his testator. But when that position comes to be compared with *Lucy v. Levington*, which is the authority there cited in support of it, it will be found not to be borne out by that case in its generality; for in that case there was an eviction in the life-time of the testator, and therefore the damages in respect of such eviction, for which the action was then brought, were properly the subject of suit and recovery by the executor; and nothing descended to the heir. But in this case there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title, and

(a) *Com. Dig.* tit. Covenant, *B.* 1.

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there is a difficulty in admitting that the executrix can recover at all, without also allowing her to recover to the full amount of the damages for such defect of title ; and in that case a recovery by her would bar the heir ; for I apprehend the heir could not afterwards maintain another action upon the same breach. Had the breach here been assigned specially with a view to compensation for a damage sustained in the life-time of the testator, and so as to have left a subject of suit entire to the heir, this action might have gone clear of the difficulty, because then it would not operate as a bar to the heir ; but framed as it now is, it seems to me that it would operate as a bar to his action. It is certainly a new point ; and if I thought that more authorities could be found than what have been cited, which, however, from the industry of the gentlemen who have argued the case, is not very probable, I should have paused. But what has been cited from *Co. Litt.*, and the other authorities, that the executor of a person who died seised of a rent could not maintain an action to recover the arrears incurred in the life-time of his testator, inasmuch as he could not represent his testator as to any contracts relating to the freehold and inheritance, is in a great degree an authority to shew that in the present case the executrix does not stand in a situation to take advantage of this breach of covenant. Therefore on the principle of what is there laid down, and in the absence of any damage to the testator, which, if recovered, would properly form a part of his personal assets, I do not know how to say that this action is maintainable.

LE BLANC J. This action is brought by the executrix to increase the personal estate of the testator. The
I difficulty

difficulty arises from its being assigned as a breach of covenant in the lifetime of the testator. The breach assigned is in not having a good title. But how is that breach shewn to have been a damage to the testator. It is not alleged that the estate was thereby prejudiced, during the lifetime of the testator; and if after his decease any damage accrued, that would be a matter which concerns the heir. The distinction which attends real and personal covenants with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor. Now this is a covenant on which after one breach has been assigned and a recovery had thereon, the party cannot again recover. It is not like a covenant for not repairing, for a breach of which damages may be recovered now, and again hereafter, and so toties quoties; although even in that case there is always a difficulty in apportioning the damages. But here no breach from which a damage accrued to the testator is stated at all. Yet the action is brought to increase the personal estate, which belongs to the executor; when the estate itself, such as it is, has come to the heir.

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BAYLEY J. The testator might have sued in his lifetime; but having forborne to sue, the covenant real and the right of suit thereon, devolved with the estate upon the heir. If this were not so, and the executrix was permitted to take advantage of this breach of covenant, she would be recovering damages to be afterwards distributed

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tributed as personal assets, for that which is really a damage to the heir alone; and yet such recovery would be a complete bar to any action which the heir might bring. The case of *Lucy v. Levington* struck me as a strong authority for the defendant: because in that case it appears there was an actual damage accruing to the testator by the eviction, whereby he was deprived of the rents and profits during his life, and of course the personal estate was so far damnified. There, as I have before observed, if the executor could not have sued, no other person could, because the testator having been evicted, there could be no heir of the land, and that was given as a reason why the action was holden to be maintainable.

Per Curiam,

Judgment for defendant.

Wednesday,
May 12th.

LUNN against LEONARD.

Where the plaintiff in error within four days after being ruled to put in better bail, viz. on the day after *Hilary* term gave notice that he should justify the same bail on the first day of the ensuing term, and two days before the first day of that term gave notice of fresh bail: Held that the latter bail were not entitled to justify, there being no reason assigned for the non-attendance of the former bail.

WALFORD opposed the justifying of bail in error, on the ground of irregularity. Within four days after the allowance of writ of error, viz., on the 8th of *February* 1813, plaintiff in error gave notice of bail. On the next day defendant ruled him to put in better bail. On the 13th of *February* plaintiff in error gave notice that he should justify the same bail on the first day of the ensuing *Easter* term, viz., on the 5th of *May*. On the 3d of *May* he gave notice of fresh bail for the first day of *Easter* term. This case came before the Court on that day, when *Le Blanc* J., (then the only Judge in court,) directed that it should stand

over,

over, in order that the practice might be looked into and settled.

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Walford now contended, that the terms of the rule for better bail not having been complied with within four days after the service, the bail ought not to be permitted to justify; that the object of the rule was, that the party should declare within a reasonable time the bail upon which he intended to rely, which object would be defeated if this practice was allowed. The defendant in error would, during the whole vacation, be without real security, as merely nominal bail might be put in, whom both parties might know to be insolvent, and whom the plaintiff in error never intended to justify; and that it would virtually amount to giving the plaintiff in error the whole vacation to find bail. He relied on *Ostreich v. Wilson (a)*, which was before the Court on
Monday

(a) OSTREICH and Another against WILSON.

THIS was a rule calling upon the sheriff of the town and county of *Kingston-upon-Hull*, to pay over to the plaintiffs or their attorneys 43*l.* 11*s.* 9*d.*, levied by him under an execution at the suit of the plaintiffs. Final judgment was signed on a day in last *Trinity* vacation, on which day notice was served on the plaintiff's agent of the allowance of a writ of error, and bail was put in within the time allowed. The defendant's attorney was ruled to put in better bail, of which no notice was taken until the 2d of *November*, when notice was given by the defendant's attorney that two persons would add themselves and justify on the 1st day of *Michaelmas* term, and on that day the bail appeared for that purpose, but were not permitted by the Court to justify on its being represented that the defendant had not complied with the rule for better bail, neither would the Court give leave to bring the money into court to abide the event of the writ of error. On the 6th of *November* a testatum *fi. fa.* was issued to the sheriff, to which he returned in the last term that he had levied and had the money.

Monday,
May 10th,

Where the plaintiff in error was ruled in vacation to put in better bail, and took no notice of it until four days before the next term, when he gave notice of added bail for the 1st day of the term: the Court would not permit the bail to justify.

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Monday last, and said that there was not any material distinction.

E. Lawes contra, referred to *Hickley v. Hutton (a)*, *B.R.*, *Hil. 27 Geo. 3.*, as in point.

Barrow, who shewed cause, contended that by the practice of this Court, if a rule for better bail be served in vacation, there was no occasion to justify until the next term, and he cited *Tidd's Prac.* 1121. and the case in the text which was then pending.

Littledale contra, relied upon the circumstance of the added bail having been rejected by the Court.

LE BLANC J. said the case alluded to differed from this; for there the party did give notice within time that he should justify the same bail, but before the bail could justify on the first day of the following term, gave notice of other bail, so that there he complied with the rule in part.

LORD ELLENBOROUGH C. J. observed that in that case there was a compliance, and the only question was whether a substitution afterwards is allowable.

Per Curiam,

Rule absolute.

(a) The facts in this case, (as appeared from a MS. note by Mr. G. Wilson,) were these: within four days after writ of error allowed, plaintiff in error gave notice of bail. Defendant ruled him to put in better bail: and plaintiff, within four days after this rule served, gave notice that he should justify the same bail the first day of the term. After the four days he gave notice of fresh bail for the same day.

Shepherd contended, that this notice should have been within four days, and that the Court was more strict in bail in error. But *Buller J.* said, no case had been cited, and the principles were the other way, and defendant in error had suffered no prejudice, for the bail could not have been justified sooner, and he had sufficient time to enquire. *Shepherd* mentioned a case in *Barnes* 211. as applicable; but *Buller J.* said, however that case might be, the practice of the *C. P.* was different, and would not be an authority here. Bail allowed.

LE BLANC

LE BLANC J. (the only Judge in court.) This case having been before the Court on a former day, I have had an opportunity of conferring with the other Judges, who agree with me in thinking, that the bail in question ought not to be permitted to justify. The principle with respect to bail in error, and bail on *mesne* process is different. As to bail in error the defendant in error is allowed 20 days to except against the bail put in, and the mode of exception is by serving the plaintiff in error with a rule for better bail. The terms of the rule are, "that unless the plaintiff in error puts in better bail within four days, execution will issue." The object then of the rule is, that the execution should not be delayed, unless security is given for the debt. In this case the party has no bail to the sheriff, as on *mesne* process; he has not any security whatever, except the bail in error. If, therefore, the practice now insisted on were to prevail, the defendant in error would remain from the end of one term to the beginning of the next, with merely nominal security; whereas the meaning of the rule for better bail is that the party shall put in such better bail as he will abide by, unless indeed they are prevented from justifying by special circumstances, which must be disclosed by affidavit at the time appointed for justifying. It is reasonable that the rule should be relaxed to this extent, as it is easy to conceive many circumstances under which good bail, of whom notice has been given some months ago, may not be able to attend in order to justify. The Court therefore will always be open to receive an affidavit, setting forth a sufficient excuse for their non-attendance; but this is the utmost extent to which this rule ought to be relaxed.

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 LUNN
against
 LEONARD.

Bail rejected.

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Wednesday,
May 12th.

The KING *against* The Inhabitants of BURBACH.

Where the father of the pauper contracted with J. S. that his son should be with him, and should work with him for two years, and have what he got, and should allow 2s. per week out of his gains to J. S. viz. 1s. for teaching him the business of a frame-knitter, 9d. for the rent of a frame, and 3d. for the standing: Held that this was a contract of hiring and service, and not an apprenticeship; and that the son's having served under it was evidence that he had adopted the contract made by his father; and therefore he was entitled to a settlement by such hiring and service.

THE Court of quarter sessions for the county of *Leicester*, discharged an order for the removal of *Mary* the wife of *William Timpson*, and her infant child, from the parish of *Burbach* to the parish of *St. Mary, Birmingham*, subject to the opinion of this Court on the following case. The pauper's husband was born at *Birmingham*, where his father was legally settled. The pauper's husband being then unmarried, and having no child, his father made a verbal agreement with one *Richard Palmer* of *Burbach*, in the county of *Leicester*, frame-work-knitter, that his son should be with him (*Palmer*) and should work with him for two years, and have what he got, and that he should allow two shillings per week out of his gains to *Palmer*, viz. one shilling for his (*Palmer's*) teaching him the business of a frame-work-knitter, nine-pence for the rent of a frame, and three-pence for the standing of the frame. Nothing was said about his being an apprentice. The pauper's husband went and served *Palmer* for two years at his house in *Burbach*, and had what he earned after the two shillings per week were deducted by *Palmer*, who found a frame and all materials, but the pauper's husband paid for the needles himself; and in regular work he earned about ten shillings per week. The pauper's husband had no right to work for any body else in *Palmer's* frame, nor did he do so to *Palmer's* knowledge; he received no wages, and boarded and slept all the time at the house of his father and mother in *Burbach*, where he also had his washing done for him; and he did not do any act as a servant

for *Palmer* by his order; and on *Sundays* he was at his father's house.

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Clarke and *Dayrell*, in support of the order of sessions, contended that the pauper's husband gained a settlement in *Burbach* by hiring and service, and that this was not to be distinguished from the case of *Rex v. Little Bolton* (a); of which case *Le Blanc J.* in *Rex v. Eccleston* (b) observed, that it had never been overruled in terms nor in principle, and the Court acted upon it in the latter case, although *Lord Ellenborough C. J.* said, that if it were *res integra*, he might have thought otherwise. It is true indeed that here it is found that the pauper's husband received no wages; but that only means wages in the ordinary acceptance of the term; for the earnings which he acquired and retained, with the exception of 2s. a-week, virtually amounted to wages. Then the case negatives that there was any express mention made of his being an apprentice. *Rex v. Laindon* (c) is distinguishable; for there a premium was paid.

Reader, *Beauclerk*, and *G. Marriott*, contra, insisted that there was no contract to bind the son. The agreement, which was a verbal one, was with the father; and although it is true that the son went and served under it, yet nothing is stated to shew that he was originally a party to the contract. [*Lord Ellenborough C. J.* inquired if it was to be contended that the son, as being an infant, was incapable of making a contract; for if it was, an answer was afforded by the case not stating any thing about his infancy. And if it was admitted that he might contract,

(a) *Cald.* 367.(b) 2 *East*, 298.(c) 8 *T.R.* 379.

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then he might also adopt a contract made for him.] A mere submission to the service will not amount to an adoption; but it must appear that there was a mutual contract between the master and servant, otherwise no settlement will be gained. It was so resolved in *Rex v. Chesterfield* (a), which case only differs in this respect, that here the contract was made with the father, there with a person standing in loco parentis. [Bayley J. The sessions have drawn the conclusion, and surely there was evidence to warrant them in so doing.] Then as to *Rex v. Little Bolton*, Lord Kenyon, in *Rex v. Laindon* (b), regretted that Lord Mansfield had not adhered to his first opinion in that case; and even when it was recognized in *Rex v. Eccleston*, Lord Ellenborough C. J. expressed a reluctant assent to it. But *Rex v. Eccleston* was so precisely similar in all its circumstances, that without overruling it the Court could not have decided otherwise. It is fair then to presume, after what has passed upon that case, that it will not be held to govern any other than those within its immediate range. Now here a distinction is observable, although it must be admitted to be a slight one; for in that case the contract was with the pauper himself; and that circumstance afforded a reasonable inference that it was a contract of hiring and service, the servant himself being the person who usually makes such a contract; but here the contract is with the father, who is naturally the party to make a contract of apprenticeship. It is said, that in *Rex v. Laindon*, which in other respects does not materially differ from this case, there was a premium; but there was no premium in *Rex v. Rainham* (c), but only a contract by the master to teach: and so in sub-

(a) 5 *Med* 329.(b) 8 *T. R.* 383.(c) 1 *Eccst.* 531.

stance there is in this case ; for the master was to have 1s. a week for teaching : and in *Rex v. Shinfield* (a) which was considered as not amounting to a case of apprenticeship, it seems to have weighed much with the Court that there was no contract by the master to teach.

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LORD ELLENBOROUGH C. J. The ground of argument taken is, that the father was the contracting party, and could not bind the son. It certainly cannot be contended that the son would at all events be bound by the contract of the father ; but in every case if a contract be made by a person standing in a peculiar relation to another, on his behalf and for his benefit, and that other performs his part of the contract, there is no authority which should restrain me from leaving to the jury whether he did not adopt the contract. It seems absurd to say that if a party contract on my behalf that I should do work, and I do it, that the rule of *omnis ratihabitio* does not apply. Every jury upon such a question would find a previous *mandatum* evidenced by the service afterwards. Here the son is acting as servant ; but if it were doubtful, the sessions have drawn the conclusion, and have not submitted to us any question whether he was bound by the contract. The question then is, whether this is a contract of hiring and service, or of apprenticeship. It certainly cannot be called an apprenticeship, nor does it bear any of its forms ; for although there is mention of an allowance to be made by the son on account of the master's teaching him the business, yet that is not peculiar to the contract of apprenticeship : it enters into the contemplation of almost every contract of hiring and service how far the servant has learnt his art, or stands in

(a) 14 *Eqst*, 544.

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need of farther instruction ; and according to his proficiency a consideration is made in the rate of wages. It is the measure to which each party resorts in apportioning the compensation ; and if the circumstance of the servant's having to learn his art is to make a difference, it would change the nature of most contracts of hiring and service, even in the meanest situations, into that of an apprenticeship. As to *Rex v. Little Bolton*, without saying whether one quite approves the principle of that case, it is enough to say that the Court has been so much in the habit of acting upon that decision that it would now be dangerous to set it aside. I do not say that if that case were erroneous and wholly destitute of legal foundation, it would not be right to set it aside ; but if it stands on plausible grounds, it ought not to be canvassed too nicely. This case is stronger than *Rex v. Little Bolton* ; there the master agreed to teach the pauper if he would work with him two years and a half or three years ; so that the teaching was of the very essence of the contract. Here there is no express contract by the master to teach, only an allowance by the servant out of the earnings for teaching, which perhaps may amount to an implied one. I will not say that an action might not be maintained upon this contract for not teaching, although upon a demurrer to a declaration framed upon it there might be difficulty. Admitting however that such a contract may be inferred, it is by no means so clear as assumed in argument ; and even if it were, it would not be so strong as *Rex v. Little Bolton*, which was an express contract. There Lord *Mansfield* observed upon the agreement not speaking of the pauper as an apprentice, and here there is no mention of apprenticeship except as far as learning and teaching are ingredients in the contract of apprenticeship, which

which they are also in almost every contract of hiring and service regularly entered into. Therefore without saying that *Rex v. Little Bolton* is not law, we cannot hold that this is not a good hiring and service.

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GROSE J. The question is, whether this is a hiring and service. I have no doubt it is. Looking at the agreement we may see what was the intention of the parties. The intention was that the pauper's husband should serve his master for two years, and he accordingly did serve him, and thus adopted the contract.

LE BLANC J. The statute law has enacted that a person may gain a settlement by apprenticeship or by hiring and service. But it has been decided, that if an apprenticeship be intended and not regularly carried into effect, it cannot enure as a hiring and service. A variety of questions therefore has arisen upon this distinction, whether the contract amounted to an apprenticeship or a hiring and service; and whenever it has appeared from the nature of the contract that the parties intended an apprenticeship, although they have failed in perfecting it, the Court has decided that it could not take effect as a hiring and service. Here the sessions have determined this to be good as a hiring and service, and unless the Court see that their conclusion is wrong, we are bound to confirm the order. It is not stated in the case whether the pauper's husband was an adult or infant; it is merely stated that he was an unmarried man having no child. In that situation his father agreed with the master that he should be with him and work for two years, which is all that is stated with respect to the service. The contract is made with another person on his behalf, and he serves

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under it. That would be evidence upon which I should think a jury might infer that he adopted it. The sessions have so inferred, and there is no objection. If that be so, then there is no material difference between this case and that of *Rex v. Little Bolton*: with the exception of names, place, and trade, the cases are the same. It will not convert this contract into an apprenticeship, because the party was desirous of improving himself in the trade in which he was to work, or even stipulated for that purpose. Every workman who contracts for his labour, and is not perfect in his art, is desirous of learning more, and it forms an ingredient in every such contract. The Court therefore will not upon this ground hold it an apprenticeship, unless they see that something more than a hiring and service was intended. Now here it was agreed that the pauper's husband should work, and he did so; and he was to allow so much per week to his master for teaching him; which is the only circumstance relied upon to shew it an apprenticeship. The question is whether that is sufficient to shew that the conclusion drawn by the sessions was wrong; I think not, after the case of *Rex v. Little Bolton*; and even if the case were new, I am not prepared to say that this would give it so much the color of an apprenticeship as to prevent this settlement.

BAYLEY J. The sessions might have trusted in this case to their own judgment, and should not grant cases unless they entertain serious doubts. They have drawn the conclusion, and unless we can say the premises do not warrant such a conclusion we ought to confirm it, although perhaps we might have drawn a different one. I do not say however in this case that we should. Al-
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lowing the utmost latitude to the arguments against the order, this was at least a contract of an equivocal nature, and the sessions have decided upon it. I think they have decided rightly.

Order of Sessions confirmed.

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The KING *against* The Inhabitants of BARNSELY.

Wednesday,
May 12th.

ON appeal against an order for the removal of *Robert Gill*, his wife and children, from the township of *Barnsley* to the township of *Killinghall*, both in the West Riding of the county of *York*, the Court of quarter sessions discharged the order, subject to the opinion of this Court on the following case :

John Gill, the father of the pauper, was bound apprentice by indenture, dated the first day of *December 1764*, to *Thomas Harrison*, in the township of *Clint*, for seven years, and served five years, until his master died, when in consideration of three guineas paid by *William Bradfield* he was assigned by *Elizabeth Harrison*, (widow of the said *Thomas Harrison*), by an unstamped indorsement on the indenture, for the remainder of his term in the words following ;

“ *April 14th, 1769.* Be it remembered, that I *Elizabeth Harrison* of *Clint*, in the parish of *Ripley*, do acquit and assign over my apprentice *John Gill*, for all the remainder of his said apprenticeship, unto *William Bradfield* the younger, of *Killinghall*.” (Signed) *Eli-*

zabeth Harrison. Held that this was evidence from which the sessions ought to have presumed, after such a distance of time, that the widow was executrix and capable of assigning the apprentice, and that *J. G.* had acquired a settlement in *K.*, and consequently that his son who had gained no settlement for himself was there settled; and the sessions having drawn a contrary conclusion, this Court quashed the order of sessions.

Where *J. G.* was bound apprentice by indenture in 1764 in the township of *C.* and upon the death of his master in 1769 was assigned by the widow by indorsement on the indenture, whereby she acquitted and assigned over her apprentice *J. G.* for all the remainder of his apprenticeship, and *J. G.* served under such assignment in the township of *K.*, which township for the last seven years had regularly relieved the family of *J. G.* whilst residing in another parish : Held that this was evidence from which the

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Elizabeth Harrison. William Bradfield. Witnesses, William Hays. George Clarkson.

No evidence was offered to shew that *Elizabeth Harrison* was either the executrix or administratrix of her husband *Thomas Harrison*. *John Gill* went to and served *William Bradfield*, as his apprentice, in *Killinghall*, till the expiration of his indenture. *John Gill's* family for the last seven years has been regularly relieved by having his rent paid by the township of *Killinghall*, during which time he and his family were residing in another parish. The pauper *Robert Gill* has not done any act to gain a settlement for himself.

The Attorney-General and *Scarlett*, in support of the order of sessions, admitted that a stamp was not necessary at the time of the assignment, and also that if the circumstance of relief had stood by itself, the sessions would have been authorized by the case of *Rex v. Wakefield (a)* in drawing a conclusion different from that which they had come to; it having been decided in that case that relief afforded to the pauper's father during his residence in another parish was evidence of the pauper's settlement in the parish affording the relief: but still it is but evidence, and therefore may be rebutted by other circumstances. Now here it appears that the relief was given under a mistake of the settlement being in *Killinghall*, for the assignment of the apprentice by *E. Harrison* was not such an assignment as would confer a settlement. It does not appear that she had any legal interest in the apprentice; she was not proved to have been executrix, and even if she had been, it should seem from the pre-

(a) 5 East, 335.

amble of stat. 32 G. 3. c. 57., which statute gives a power to the executor to assign, that before that act the apprenticeship ceased on the death of the master. [Bayley J. observed that the act was confined to parish apprentices.] It must be admitted that in *Rex v. East Bridgford* (a), which was before the act, such an assignment as the present was holden sufficient, and there it was argued as if the widow was to be considered as executrix de son tort; but that argument does not seem to be confirmed by the decision in *Rex v. Chirk* (b); and suppose the widow had been sued as executrix, and she had pleaded ne unques executrix; could this assignment have been given in evidence to disprove such plea? [Lord Ellenborough C. J. The words, "I assign over my apprentice," purport that she had an interest. *Le Blanc* J. I suppose the ground taken at the sessions was this; that at the distance of 40 years from the assignment, by which assignment the widow has assumed to act as if she had an interest in the apprentice, and after the parish had maintained the pauper's family for seven years, whilst resident in another parish, the sessions ought not to have required actual proof of her being executrix.] The sessions might draw the conclusion which they have drawn, that she was not executrix. Besides there is another objection, viz. that this assignment was by indorsement on the deed, but it is not competent to assign over a deed without a deed: therefore it could not be a regular assignment without a deed. [Lord Ellenborough C. J. But it might operate as a consent of the widow to the change of service. Bayley J. The case of *St. Petrox v. Stoke Fleming* (c) shews, that such assignment need not be by deed.]

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(a) *Burr. S. C.* 132.(b) *Burr. S. C.* 782.(c) *Burr. S. C.* 248.

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 tants of
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Lord ELLENBOROUGH C. J. The only doubt is, whether where the sessions have drawn a conclusion palpably erroneous upon two points, we should send the case down again, or in case of the parties draw the irresistible conclusion ourselves. The relief given by the parish of *Killinghall* to the family of *John Gill* for seven years is evidence of such preponderating weight that I should think any Judge would direct a jury to find upon such evidence, (supposing the question legally to come before them) that *Gill* was by some means or other a settled inhabitant of that parish. It does not indeed amount to an estoppel; but it is cogent evidence against the parish. The sessions also ought to have drawn a different conclusion on the other point. The assignment (which it is admitted was not at the time required to be stamped) is in its form an assignment by the widow “as my apprentice;” and at this distance of time we will presume, if necessary, that she was lawful executrix; or even if she were executrix of her own wrong, still according to the case of *The King v. East Bridgeford*, if the pauper lived 40 days under that assignment we should hold him settled in the parish; and one case is enough on such a subject.

Per Curiam,

Order of Sessions quashed.

Holroyd and *Hamerton* were to have argued against the order.

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The KING *against* The Inhabitants of RINGWOOD. *Wednesday, May 12th.*

BY an order of two justices, *Charles Trowbridge*, his wife and children were removed from the parish of *Tollard Royal*, in the county of *Wilts*, to the parish of *Ringwood*, in the county of *Hants*. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case :

The pauper, being legally settled in the parish of *Tollard Royal*, and renting a cottage there of the annual value of thirty shillings, about *Easter* 1806 took a dairy of seven cows at seven pounds a cow for twenty weeks. The cows were to be fed on lands of upwards of ten pounds annual value, part lying in the parish of *Cranbourne*, and part in the parish of *Ringwood*. The pauper also had a small house with the dairy situate in the parish of *Ringwood*, in which house the pauper's wife and family resided during the whole twenty weeks, and the pauper slept sometimes at *Tollard Royal*, and sometimes at *Ringwood*. For about twelve weeks of the time he slept at *Ringwood*, and about eight weeks in his cottage at *Tollard Royal*, of which he kept possession during the whole time. About nine o'clock of the night before the pauper gave up the dairy, having slept the preceding night at *Tollard Royal*, he came to *Ringwood* to pack up his furniture, and fetch back his wife and family; and he passed the night there, but did not sleep nor go to

Where a pauper rented separate tenements of the joint-yearly value of 10*l.*, in the parishes of *T.* and *R.*, and had a house in each, in one of which in *R.*, his family resided, and he sometimes slept in one and sometimes in the other, and on the last night of his holding the tenement in *R.*, having slept the preceding night in *T.*, he came to *R.* to pack up his furniture and fetch back his family, and passed the night there, but did not sleep or go to bed, but was occupied in moving, and left the house with his family very early the next morning. Held that his settlement was at *R.*

The renting an acre of land at 8*l.*, from *Easter* to *Octo-*

ber, for planting potatoes, where the land had been previously dug by the landlord for that purpose, and would not have been let for more than half that price if it had not been dug, was considered as a tenement of the yearly value of 8*l.*, although the case stated that in a common way an acre of such land would not let for more than 2*l.*

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bed, but was occupied in packing up his goods. A waggon came about two o'clock in the morning to take the goods, and the pauper, his wife and family, with the waggon and goods, left their house at *Ringwood* between five and six o'clock in the morning, and returned to their cottage at *Tollard Royal*. The pauper afterwards quitted this cottage, and in the same year rented another cottage in the same parish of *Tollard Royal*, for which he paid two guineas a-year, and he had the use of a yard for his beasts, pigs, and fowls to run in, for which he paid one pound a-year, and his landlord had the use of the yard at the same time. Whilst he occupied this cottage and yard, he took nearly an acre of land in another parish at the rent of eight pounds from Easter to October following, for planting potatoes. The ground had been dug by the landlord for that purpose, and it would not have been let for more than half that price if it had not been dug. The pauper got a good profit by his crop; he also took twenty-eight lug of land of another person, which was ploughed for the same purpose, for which he paid fourteen shillings; and during the time he rented these pieces of land, he lived with his family in his house at *Tollard Royal*. Other land is let in the same parish at the same rate, when ploughed and prepared ready for potatoes in like manner. In a common way an acre of such land would not let for more than two pounds, though when dug for a crop of potatoes it would let for eight pounds.

W. Williams and *Barwis*, in support of the order of sessions, began by adverting to an objection which they said might perhaps be made to the pauper's settlement in *Ringwood*, viz. that he had not slept there the last night

night of his holding the dairy, but had merely gone thither for the purpose of removing his family, and was engaged in so doing during the whole night; so that the last night of his sleeping might be contended to be the preceding night, when he slept at *Tollard Royal*, and consequently his settlement would be there: [but Lord *Ellenborough* C. J. interposed by saying that he supposed that point would hardly be made; that the Court would not enter into minute enquiries whether the pauper slept, in the literal sense of that word; what would satisfy “pernoctavit,” would be sufficient. The material question was, whether he had not gained a subsequent settlement in *Tollard Royal*.] As to that point they contended, that the pauper, whilst he resided in the second cottage at *Tollard Royal*, did not rent a tenement of the yearly value of ten pounds; inasmuch as the land which he rented for potatoes could not be estimated at the value which he paid for it, but at its value communibus annis, which appeared by the case to be only two pounds per annum. That was the fair yearly value of the land, which is the criterion fixed by the statute, and therefore the tenement must be estimated according to such value, and not according to the rent; and so it was determined in *Rex v. St. Matthew, Bethnall Green* (a), and *Rex v. Hellingly* (b). Here the additional rent beyond two pounds was only a payment made in consideration of an extraordinary portion of labour bestowed upon the land by the landlord, but had nothing of that permanent nature which is implied in the term yearly value; it was so much paid for digging the land. Suppose the pauper had dug it himself, and by that

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(a) *Burr.*, S.C., 574.(b) 10 *Eqst.*, 41.

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means increased its value, or that he had agreed to give eight pounds for it provided the landlord would dig it, could it be contended in either of those cases that he had taken land of the yearly value of eight pounds? Then it can make no substantial difference that the labour was bestowed beforehand, if it be true that the value of labour cannot form a component part of the yearly value of a tenement. If the pauper had taken this land by the year, he must have left it in as good a state as when he entered upon it, and then the labour required for that purpose would have been so far a reduction of its value in his hands.

Casberd and *W. Grant*, *contra*, were stopped by the Court.

GROSE J. (a). The only question is, whether the pauper came to settle on a tenement of the yearly value of ten pounds. Looking at the case, we find that he went to *Tollard Royal* with his family, and resided there more than forty days. As to the value of the tenement which he occupied during that time, it is expressly stated to be above ten pounds; but it has been contended that the land which he rented from *Easter* to *October* for planting potatoes might be worth eight pounds for that time, and yet not of that value for a year. That proposition I do not understand, and therefore cannot assent to it.

LE BLANC J. In this case the pauper rented a cottage in *Tollard Royal* at two guineas a-year, during which

(a) Lord *Ellenborough* C.J. left the court during the argument.

time he also rented nearly an acre of land in another parish from *Easter* until *October* for planting potatoes, at the rent of eight pounds ; which land had been previously dug by the landlord, and would not have been let for more than half that price, if it had not been so dug. The pauper also took another piece of land at fourteen shillings. All these premises taken together at the rent for which they were let, amount to above the value of ten pounds. But the question is, whether we are to reduce that value by taking the land which was let for eight pounds at the rent for which it would have been worth to be let, if it had been in a different state ; or in other words, whether we are to deduct from the rent the value of the labour bestowed by the landlord on the premises before he let them. I think the Court must look to what was the value of the tenement at the time the pauper came to settle upon it, without considering by what means it became of that value. I agree with the gentlemen who have argued on the other side, that the value of the tenement increased by the labour bestowed upon it after the letting cannot be taken into the account ; as if the pauper had taken it at the rent of five pounds, and had bestowed labour upon it to the amount of five pounds more, that would not have made a renting of ten pounds. But where the labour has been previously bestowed so as to make the land fairly worth the rent at the time it is taken, the Court cannot separate the value of that labour from that of the land.

BAYLEY J. This is nothing more than a party taking land in a high state of cultivation, which has rendered it of the value agreed to be given for it at the time of

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the taking. Nor do I think that it would have been worth less if it had been taken for a whole year. It is urged, indeed, by the counsel, that if the pauper had taken it for a year, he would have had to dig it himself, and then it would have been of less value to him than what was given for it for a shorter period; but it does not follow, that if he had taken it for a year, he would necessarily have had to dig it. I think therefore that this tenement, coupled with the other property, amounts to a tenement of more than ten pounds a-year.

Order of sessions quashed (a).

(a) See *Rex v. Purley*, 16 East, 126.

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The KING *against* The Inhabitants of OLNEY.*Wednesday,
May 12th.*

THE Court of Quarter Sessions for the county of *Buckingham* discharged an order of two justices for the removal of *Richard Mayes* from the parish of *Olney*, in the said county, to the parish of *Earls Barton*, in the county of *Northampton*, subject to the opinion of this Court on the following case :

The respondents proved the pauper settled at *Earls Barton* by a certificate, dated the 25th of *July* 1788, and directed to the parish of *Olney*, acknowledging him to be then a legally settled inhabitant of the parish of *Earls Barton*. In order to shew a subsequent settlement, the appellants proved that whilst the pauper was residing in the parish of *Olney* under the said certificate, in or about the month of *September* 1800, and some time prior to the execution of the deed of feoffment hereinafter mentioned, he agreed with one *Michael Hinde*, that he, the pauper, would purchase a messuage belonging to *Hinde*, situate in *Olney* at the sum of 52*l.*, if *Hinde* would allow 40*l.*, part of the said 52*l.*, to remain upon mortgage, to which *Hinde* consented; and in pursuance thereof, by a deed of feoffment, bearing date the 8th of *October* 1800, *Hinde*, in consideration of the sum of 52*l.*, therein mentioned to be paid by the pauper, conveyed to him (the pauper) in fee the said messuage; and upon the deed of feoffment there was indorsed a receipt for the consideration-money of 52*l.*, but in fact only 12*l.* were paid to *Hinde*, and the

Where the pauper purchased a messuage for 52*l.*, under an agreement that the vendor should allow 40*l.* of the purchase-money to remain upon mortgage, and such mortgage was accordingly made, and 12*l.* only paid by the pauper to the vendor, who kept the title-deeds in his hands, but the pauper took possession, and resided in it for some years, but was unable to pay the rest of the purchase money, and afterwards agreed to sell it to *B.* for 60*l.* who thereupon paid the 40*l.* to the original vendor, upon his delivering up to him the title-deeds, and the remaining 20*l.* to the pauper, on the execution of the conveyance to him, at which time the pauper quitted the messuage, not having resided on it 40 days after

the payment of the 40*l.* to the original vendor: Held that the pauper did not gain a settlement by residence on such estate.

remaining

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remaining sum of 40*l.* was secured to him by deed of mortgage, bearing date the 9th of *October* 1800, by which the pauper, pursuant to the agreement before mentioned, demised the said messuage to *Hinde* for a term of 1000 years, in consideration of the sum of 40*l.* in the deed of mortgage mentioned to have been paid by *Hinde* to the pauper; and there was a proviso for the deed's becoming void upon payment by the pauper, his heirs, executors, or administrators, to *Hinde*, his executors, administrators, or assigns, of the sum of 40*l.*, with lawful interest, upon the 9th of *April* then next ensuing. The feoffment and deed of mortgage were both executed at the same time, and remained, together with the title-deeds, in the custody of *Hinde*. The pauper immediately entered into possession of the messuage, and continued to reside therein, and paid the interest upon the said sum of 40*l.* to *Hinde*, until the execution of the deeds hereinafter mentioned; but, during such time, never had the ability to pay off the principal. About a month before the 12th of *June* 1812, the pauper agreed with one *Thomas Bowden* to sell to him the said messuage, in consideration of the sum of 60*l.*, and soon afterwards *Bowden* paid to *Hinde* the sum of 40*l.* in discharge of his mortgage, and in part of his (*Bowden's*) purchase-money, and received from *Hinde* the title-deeds, together with the deeds of feoffment and mortgage, which *Hinde* had never delivered up to the pauper. Afterwards by indorsement on the said indenture of mortgage, bearing date the 12th of *June* 1812, *Hinde*, in consideration of 40*l.* to him therein mentioned to be paid by the pauper, assigned the term of 1000 years to the pauper, and by deeds of lease and release, dated respectively the 12th and 13th of *June* 1812, the pauper

conveyed the messuage to *Bowden* in fee for the consideration of 60*l.*; and 20*l.*, being the balance of the purchase-money, were then paid by *Bowden* to the pauper. The indorsement and indentures of lease and release were all executed at the same time. The question for the opinion of the Court is, whether the pauper gained a settlement in the parish of *Olney* by the purchase of the above estate and residence thereon.

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Best, in support of the order of sessions, contended that the pauper gained a settlement by the purchase, it being a purchase of an estate for more than the sum of 30*l.*, bonâ fide paid, although in fact 12*l.* only were paid at the time of the execution of the conveyance, and therefore it was not within the stat. 9 G. 1. c. 7. The principle which governed *Rex v. Tedford* (a) applies to this case. That was a purchase for 39*l.*, of which 9*l.* only were paid by the purchaser, and the remainder was borrowed on mortgage; and it was holden, that the case was not within the statute, Lord *Hardwicke* observing that it would be hard to enquire whether the purchaser borrowed the money. And the same was ruled in *R. v. Chailey* (b). Both those cases are like the present in this, that the pauper mortgaged the premises as a security for part of the purchase money; and the first has this farther resemblance, that the pauper did not himself pay the remainder of the purchase money; and although there it was paid immediately, and here not until some years after the purchase, still when ultimately discharged on the 12th of *June* 1812, it became a bonâ fide

(a) *Burr. S. C.* 57.(b) 6 *T. R.* 755.

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payment of the whole sum. [*Bayley J.* The pauper did not reside forty days after that time.]

GROSE J. (a) The question is, whether this was a purchase for the sum of 30*l.* bonâ fide paid, so as to satisfy the stat. 9 G. 1., where the purchase was contracted for upon security to be given for part of the purchase money, and such part never paid by the purchaser. The case in substance states that the premises were mortgaged for 40*l.* of the purchase money, and that that money was not paid. But I think that the consideration must be bonâ fide paid at the time of the purchase, in order to satisfy the statute. Then it is clear that this was not a purchase of an estate for 30*l.* paid at the time; the consideration money having remained upon security.

LE BLANC J. The stat. 9 G. 1. enacts that no person shall gain a settlement by virtue of any purchase of any estate, whereof the consideration doth not amount to 30*l.* bonâ fide paid. The question arises on the purchase. The purchase money amounted to 52*l.*, of which 12*l.* only were paid at the time, the rest was left on mortgage to the vendor. That circumstance distinguishes it from the cases cited, where the party purchasing paid the whole money to the vendor, by borrowing a part aliunde; so that there he had credit to borrow of others. But in *Rex v. Mattingley* (b), which has not been cited, it was held where the purchaser contracted for the purchase of a copyhold estate for 39*l.*, which was mortgaged for 32*l.*, and paid only 7*l.*, and

(a) Lord Ellenborough C. J. was absent.

(b) 2 T. R. 12.

was admitted subject to the mortgage, that it was not a purchase for 30*l.* bona fide paid, so as to take it out of the statute. That is a direct authority on this part of the case. But it has been argued upon a supposed difference, inasmuch as the purchase money was ultimately paid in the subsequent transaction with *Bowden*. But how does that stand? All that was done by *Bowden*, when he became the purchaser of the estate, was, to pay off the incumbrance in order to get the title deeds into his hands, which had never passed from the original feller into the hands of the pauper. That was a payment therefore made by *Bowden* for his own benefit, and not on behalf of the pauper.

BAYLEY J. concurred.

Order of Sessions quashed.

King was to have opposed the order.

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C A S E S

ARGUED AND DETERMINED

1813

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-Third Year of the Reign of GEORGE III.

FOMIN *against* OSWELL and Another.

Thursday,
May 13th.

THE declaration in this case contained special counts in assumpsit against the defendant, as broker, for omitting to insert in the policy a leave to carry simulated papers, *per quod* the plaintiff was prevented from recovering against the underwriters (a); and there were also the common counts.

At the trial the plaintiff failed upon the special counts; but to intitle himself to a verdict, put in an account rendered by the defendant to the plaintiff, consisting of various items both on the debet and credit side, with a balance struck of 4*l.* 19*s.* due to the plaintiff; and obtained a verdict for that sum, which was entered on the count for money had and received.

Where the plaintiff in assumpsit failed to prove his special counts, but upon the common counts recovered less than 5*l.* upon the balance of an account which contained items both on the debet and credit side; Held that by 39 and 40 G. 3. c. 104. he was deprived of costs, it appearing that the defendant resided and traded in London.

(a) See *Oswell and another v. Figne*, 15 *East*, 70.

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Gaselee on a former day obtained a rule nisi to enter a suggestion on the *London* act 39 and 40 *Geo. 3. c. 104.* (local) to deprive the plaintiff of his costs, the damages being under 5*l.*, and the defendant residing and trading in *London*, and being liable to be summoned to the court of requests.

Marryat now shewed cause, and contended that this case was not within the act, inasmuch as it was not a debt reduced by part payment before the action brought, but was in fact reduced by a set-off, though no notice of set-off was given; and referred to a case decided on the *Southwark* act (b) which he stated to be similar to the present, in which it was held, that where the demand was founded on the balance of a larger account the case was not within the act.

Gaselee referred to the two acts, which were different; the *Southwark* act expressly excepting actions brought for the balance of an account, whereas the *London* act contained no such exception. He also stated that no evidence was given of the items of the account, but the only evidence was the account itself, in which the balance was struck in the hand-writing of the defendant.

The Court thought this a case within the statute, and made the

Rule absolute.

(b) *Porter v. Philpot*, 14 *East*, 344.

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TOLPUTT *against* ANN WELLS, Executrix of WELLS
deceased. (a)

Friday,
May 14.

THIS came on upon demurrer to the rejoinder; the declaration was upon a bill of exchange drawn by the plaintiff, and accepted by the defendant's testator; the defendant pleaded that one *J. Monday* in Michaelmas term in the 52d year of the king, impleaded the defendant as executrix of *Wells* in a plea of debt for the sum of 1990*l.*, claimed by *Monday* to be due and owing to him from the said *Wells* in his lifetime and at the time of his decease, and thereupon recovered judgment for the said sum of 1990*l.* to be levied in part, *viz.* as to 1250*l.* upon the goods and chattels of the testator, then in her hands, and as to the residue *de bonis quando acciderint*: which judgment still remains in force and unsatisfied: the plea then alleged that at the commencement of this action 1990*l.* were and still are due upon the judgment, and that she hath fully administered, except goods and chattels of the value of 1250*l.* which are not sufficient to satisfy the debt due on the judgment, and which are liable to satisfy the same. Replication; that before and at the time of obtaining the judgment in the plea mentioned, there was really and justly due to *Monday* from the defendant as executrix, a much less sum of money than the sum of 1990*l.*, to wit, 150*l.*, and no more, and that the defendant at the time of obtaining the judgment, had and now hath goods and chattels of the testator in her hands more than sufficient to pay the sum really due to *Monday*; but that the judgment so recovered against

A judgment confessed by an executrix to a creditor of the testator as well for his own debt as in trust for the debts of many of the creditors, cannot be pleaded in bar to an action brought against her by another creditor of the testator.

Plea that *M.* recovered a judgment against defendant as executrix for 1990*l.* claimed to be due to him from the testator; rejoinder that the judgment was confessed to *M.* for that sum for his own debt and as trustee for the debts of many other creditors: Held that the rejoinder was a departure from the plea.

Quære, if a plea of judgment recovered must state the cause of action.

(a) This case was partly argued at *Serjeants Inn.*

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the defendant for 1990*l.* was recovered for that sum by fraud and covin between *Monday* and the defendant, with intent to defraud the plaintiff of his damages in the declaration mentioned.

Rejoinder; that the testator at the time of his death was indebted to divers persons, to wit, to *J. Monday* in the sum of 9*l.*, (it then proceeded to enumerate the names of many other creditors with the sums alleged to be due to each, making a total debt amounting to 1998*l.*,) which said several sums of money at the time of making the agreement hereafter mentioned, and the recovery of the judgment in the plea mentioned, were wholly unpaid; and that the goods and chattels of the testator in the hands of the defendant being wholly insufficient to pay the whole of the several sums due to the said creditors, it was agreed between the defendant and the said creditors, that she should execute a warrant of attorney to secure to the said *Monday* for himself, and as trustee for the said creditors, the payment of their debts; that in pursuance of such agreement, and before the commencement of this suit, the defendant did execute a warrant of attorney as executrix, to confess a judgment to *Monday* (to be entered up in the manner as is set forth in the defendant's plea) for 1990*l.*, money borrowed by the testator in his life time of *Monday*, with a defeazance that it should remain in force until the several debts due to the said creditors should have been fully satisfied. The rejoinder then proceeded to state that the said creditors subscribed their names to the warrant of attorney, and that their debts exceeded 1990*l.*, for which judgment was obtained, and that the defendant hath fully administered except goods and chattels of the value of 1250*l.*,
which

which are not sufficient to satisfy the money due to the creditors who subscribed the said warrant of attorney, and which are liable to satisfy the same. It then averred that the warrant was given and judgment recovered in pursuance of the agreement for the benefit of the said creditors, and was not recovered by fraud and covin as alleged in the replication.

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Demurrer to the rejoinder, assigning for causes, that the rejoinder does not support the plea, but is a departure therefrom, inasmuch as in the plea the judgment alleged to have been recovered by *Monday*, is stated to have been recovered for 1990*l.*, claimed by *Monday* to be due to him from the testator in his lifetime and at his decease; whereas by the rejoinder it is acknowledged that the said sum of money for which judgment was recovered by *Monday*, was not wholly due to him, but that a small part thereof only was due to him, and the residue to divers other persons, and that the judgment was obtained by him as a trustee only for himself and such other persons; and that the rejoinder is in other respects defective, insufficient, and informal.

Gaselee, in support of the demurrer, made two points; first, that the judgment confessed by the defendant as executrix, to one simple contract creditor as a trustee for many other simple contract creditors, could not be pleaded in bar to this action. The only authority which can be said to favor such a plea is what fell from *Lawrence J.* in the case of *Meux q. t. v. Howell (a)*; for as to the case itself it cannot be deemed an authority upon this

(a) 4 *East*, 9, 10.

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point ; it being a penal action brought against the defendants on the 13 *Eliz. c. 5.* for being parties to a covinous judgment ; which judgment was confessed by a debtor for the benefit of *all* the creditors, and therefore affords a material distinction between that case and the present, where there is an exception at least of the present plaintiff, if not of more creditors. It is clear that this judgment could not have been confessed by previous agreement with the creditors named ; inasmuch as the sum for which it was confessed does not correspond with the aggregate amount of their debts. So that this must be taken as nothing more than a contrivance between the executrix and *Monday* to defeat the plaintiff of his action. It is sufficiently hard upon a creditor who has used due diligence in commencing his action, to find himself barred by a judgment confessed to another creditor ; this, however, the law permits an executor to do, although it has been considered as somewhat of an anomaly. But if this judgment can be pleaded, it will enlarge the power of an executor to give a preference far beyond its former limits ; for it will enable him to the prejudice of any one creditor, to confess a judgment to another creditor not merely for his benefit, but for the benefit of any number of creditors whom the executor may choose to select ; although not one of those creditors shall have used any legal diligence to obtain that judgment ; and it will also enable the executor, acting in concert with one creditor to commit a fraud on all the other creditors. Secondly, the rejoinder is a clear departure from the plea for the cause assigned in the demurrer ; the plea alleges the judgment to have been recovered for money claimed to be due to *Monday* as for his own debt ; whereas in the rejoinder it is stated

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to be for money due not only to *Monday* but also to several other creditors. And this allegation in the plea is material and cannot be rejected, so as to make the plea consistent with the rejoinder: but even if it could be upon general demurrer, yet, where objection is taken upon special demurrer, it cannot be considered as surplusage (a).

Comyn, contra, in answer to the first objection, said that no case had been cited to shew that it was either illegal or improper for an executor to confess a judgment like the present. It is said, indeed, that to permit such confession would be imposing a hardship on a plaintiff, who has used due diligence for the recovery of his debt; but if the testator in his lifetime might himself have confessed such a judgment, and have subjected his property to an execution thereupon, and that, even after action brought against him by another creditor; surely the executor may give the same preference, which his testator might have given. It is true, that after action brought by one creditor the executor cannot pay the other creditors as the testator might have done, but still he may do that indirectly, by means of confessing a judgment which he cannot do directly. It appears from the third resolution in *Veale v. Gatesdon* (b), that where a judgment is recovered against an executor for a just cause it cannot be said to be covinous, although it was done for the purpose of defeating another creditor. So in *Williams v. Fowler* (c), which underwent three arguments, *Eyre J.* said, “there is no in-

(a) 1 *Wils.* 98. *Barlow v. Evans* *Str.* 694. *Courtenay v. Satchwell*.

(b) *Sr W. Jones*, 92. (c) *Str.* 410.

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convenience in letting executors confess judgments; for if there be a precedent debt, all is fair; if none, the party will have them on the fraud." These authorities therefore clearly establish the right of an executor to confess a judgment in order to give a preference. In this case it may be asked, what more has the executrix done? Here the executrix pleads a judgment recovered against her by *M.* before the commencement of the plaintiff's action for a sum certain; in reply to which, the plaintiff denies that the testator was indebted to *M.* in so large a sum as the sum recovered. It therefore became necessary for the executrix to explain how the judgment came to be confessed for so large a sum, in order to shew that it was *bonâ fide*: and she has done so; and it is admitted on the pleadings, that the judgment was confessed for fair and *bonâ fide* debts: but objection is taken, that this is not a judgment confessed to one creditor for himself, but to one on behalf of himself and several creditors. But if an executor has by law a right to confess a judgment to a particular creditor, why may he not, in order to avoid a multiplicity of actions, confess a judgment to one for the benefit of many? If there be a precedent debt, according to what was said by *Eyre J.* (a) all is fair. So in *Meux v. Howell* (b), *Lawrence J.* was of opinion, that a plea by an executor, stating that the testator was indebted to *A. B. and C.* in so much respectively, and that the judgment was acknowledged to *A.* in trust to secure all their debts, would be good. Lord *Kemyon* also seems to have expressed himself to the same effect in several passages cited in argument in that case, which shew it was his opinion that it is neither illegal nor immoral to prefer one set of creditors to

(a) *Str.* 410.(b) 4 *East*, 10.

another. The only case where the law does not allow such a preference is, where a voluntary preference is given by a trader in contemplation of bankruptcy. It is true the precise point now under discussion has not before arisen; but it is submitted upon the principles already established in the cases cited, that such a judgment may be confessed by an executor, especially as it will avoid a multiplicity of actions. If this defendant instead of confessing one entire judgment for the benefit of each, had confessed separate judgments to each creditor, the plaintiff could not have replied *per fraudem*; and there seems to be no greater injury likely to arise to the plaintiff from this form of confession than from the other. [Lord *Ellenborough* C. J. inquired whether in pleading a judgment recovered it was not usual to shew in pleading how the debt accrued.] It was considered not to be necessary in *Williams v. Fowler* (a). It is usual, indeed, in pleading judgments to state the cause of action; but many precedents may be found where the allegation is simply for a certain cause of action. It is unnecessary to state either the precise sum or the cause of action. The party pleading may rely upon the judgment without shewing the consideration of it, the want of which should come of the other side, who may impeach it for the fraud if there be any. On the second point, he insisted that the rejoinder was not to be taken as a departure, but merely as explaining and fortifying the plea. The plea does not contain a positive allegation that the testator was indebted to *M.* in so much, but only that *M.* impleaded the defendant as executrix for so much. Then the rejoinder shews how he came

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(a) *Str.* 407.

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to sue for that sum which is in aid and explanation of the plea. But admitting it to be a departure, still it is a departure in a thing not material, which according to the authorities (a) will not vitiate.

Gaselee, in reply. Upon the principal question, if the case be new, the Court will pause before they sanction such an extension of the established practice as is now contended for; more especially as the established practice itself is an anomaly; and is the only instance where a party can avail himself of an act done subsequently to defeat a prior action. To extend the practice would be productive of the inconvenience, of which this case is an instance; for the judgment confessed not only covers the whole of the present assets, but also any future assets which may come to the hands of the executrix. As to the dictum of *Lawrence J.*, in *Meux v. Howell*, it cannot be regarded as a judicial decision, conclusive of the question. As to the second point he maintained his former argument; but supposing that failed, he further insisted, in objection to the plea, that it did not state the cause on which the debt accrued, or that the debt was due from the testator at the time of his death; both of which should be stated in a plea of judgment recovered. In *Williams v. Fowler*, although this objection was adverted to, the Court without much considering it, seem to have decided the case upon another ground, viz. that the judgments were not fraudulent.

LORD ELLENBOROUGH C.J. This is a fanciful attempt to introduce a novelty in the established law relating to

(a) *Co. Lit.* 304. *a. Com. Dig. Plead. F.* 11.

executors. The law is, that an executor upon action brought against him by a creditor of his testator has his hands tied, so that he cannot afterwards make any payment to the prejudice of that creditor. But he has no direct power of accelerating a suit instituted by one creditor, and still less have the body of creditors: that being the case, if an executor had not power to confess a judgment, his operations and duties might be suspended and paralyzed by one creditor protracting his suit; and in the same manner might the other creditors be delayed of their rights. The only means then which the executor has of accelerating such suit is by confessing a judgment. But to whom must this be done? To a creditor alone, but not to a stranger: there is not any authority to shew that an executor may confess a judgment to a stranger. Now in this case *Monday* is a mere stranger *quoad* all but *9l.* If then this judgment be good, it would go the length of enabling an executor to confess a judgment to a creditor, who claimed a debt of *1s.* only, to the extent of *10,000l.*, provided the testator's debts amounted to so much. Would this be beneficial either to the creditors or the executor? First as to the executor; supposing him sued afterwards by another creditor, he must plead this agreement, *viz.* that it was agreed between him and the other creditors that he should execute a warrant of attorney to confess a judgment to one of them for the benefit of those creditors, and that in pursuance of such agreement he did so execute. No doubt the agreement would be evidence against those who subscribed it: but is it so clear that it would be evidence against the creditor who was not a party to it? If not, as probably the executor could have no other evidence, he would stand in an unprotected

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situation with respect to the creditor suing, and nevertheless be bound by a judgment recovered in trust, against him. Then to consider what benefit would arise to the creditors from having such a judgment; they would only acquire the benefit of a suit in equity; for if the trustee would not pay them, they must resort to a court of equity to compel him, unless they could maintain an action of assumpsit: at all events, it would only be to them the first step gained either for an action at law or suit in equity. This, therefore, is a novelty in the law of executors, which would be neither beneficial to them nor to the creditors. As to the dictum of *Lawrence J.* in *Meux v. Howell*, I think that it is at the discretion of the executor to confess a judgment to a creditor to the full extent of the debt due to him; but it must be restrained by the amount of his debt, because the executor is not to be charged with more than is really due to the creditor. So much as to the merits. As to the departure the case is equally clear. The plea is, that *M.* impleaded the defendant in a plea of debt for 1990*l.* claimed by *M.* to be due and owing to him. But no such sum is really claimed by *M.*, but on the contrary, he claims only 9*l.*; and so the defendant adds in his rejoinder: this therefore is a clear departure as admitted in the rejoinder, for it appears by that, the debt is due to a multiple of persons and not to *M.* alone as alledged in the plea.

GROSE J. I cannot think this agreement can be supported as pleaded. It is in reality a fanciful attempt at novelty, and nothing more clearly shews it than this, that there is no instance of such a form of pleading. The agreement itself would go to defeat the whole law
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of assets, and to give a preference to single contract creditors over specialty creditors, who by using due diligence are entitled to a priority. Upon the other point, my Lord has entered very fully, and I am not prepared to add any thing.

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LE BLANC J. I perfectly agree with my Brothers on both points. I think this is a novel attempt to introduce a mode of pleading different from that which has hitherto prevailed. Suppose the whole of the facts disclosed in the rejoinder had been included in the plea, — the plea would then have stood thus, viz. that the testator at his death was indebted to a number of persons in different sums of money, and that the defendant as executrix gave a warrant of attorney to confess a judgment to one of those creditors, to enure to the benefit of all, and that she had assets only to such an amount, which were not sufficient to pay the debts of all. Could it be contended that such a plea would be sustainable? It is clear that where a testator dies indebted both in specialty and simple contract debts, and the simple contract creditor has brought an action upon his debt, that the executor has no right to pay a creditor in equal degree; but as he cannot compel that creditor to proceed, he may accelerate him by confessing a judgment to another creditor, and may afterwards plead that judgment to the action. So far the law allows: but on the other hand, a creditor has a right to the fruits of his diligence, and may avail himself of the means of compelling an executor to plead before he can confess a judgment; and if the executor should pray for time to plead, he would obtain it only on condition of his not confessing a judgment. The present mode of proceeding would defeat all these rules; for

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for the executor would be enabled to plead one judgment once for all, which would make it nugatory ever to impose terms upon him on his applying for further time. The effect also of this mode of pleading would be to enable the executor to set up in bar of this action the claims of a number of creditors, whose debts still remain simple contract, not altered by any thing that has been done. *Monday*, indeed, has a higher debt, but not the other creditors, although they may have a claim in equity against him. Their debts therefore cannot be thus set up. There is another ground also against this mode of pleading, viz. that although it is not illegal or immoral for an executor to confess a judgment, yet certainly the law has expressed a great jealousy lest it should be made an improper use of, and on that ground it proceeds when it imposes terms on an executor who prays for time to plead. That brings it to the second question, whether this be a departure? The plea states that *M.* impleaded the defendant for a sum of 1990*l.* claimed by *M.* to be *due to him*, and that such proceedings were had, that he recovered against the defendant the said sum, &c.: so that the claim is clearly made as for a debt of 1990*l.* due to himself. The rejoinder states, not that he claimed the sum of 1990*l.* as due to himself, but a smaller sum only as due to himself, and the rest, which is the larger sum, for the other creditors, and that judgment was confessed for the benefit of himself and the other creditors. Admitting that perhaps it was not necessary for the defendant to have alleged in her plea, that *M.* recovered judgment upon a debt claimed to be due to himself, yet if she does make such allegation I cannot say that it is immaterial or impertinent. The rejoinder therefore is a clear departure from the plea. The only authority which the

industry of the counsel has been able to furnish, is a dictum of *Lawrence J.* in *Meux v. Howell*, which seems to me to have been thrown out rather as a question to the counsel in the course of the argument, to ascertain how far such a judgment would be fraudulent, than as an opinion of that learned judge. I do not therefore feel pressed with the weight of it as if it had been his deliberate opinion.

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BAYLEY J. I am of the same opinion. This is a contrivance to pay the creditors through the intervention of *Monday*, a sum of money which the executrix would not have been entitled to pay without his intervention. Where an action is brought by a creditor of the testator against his executor, the executor is restrained from paying any other creditor in equal degree except upon compulsion. That inconvenience may however be obviated by any of the creditors filing a bill in a court of equity against the executor for an account, in which case it seems that all the creditors may be compelled to take an equal distribution of the assets (a); therefore, although at first sight it may seem hard that one creditor should tie up the hands of the executor by bringing an action at law, yet this may be remedied in equity. But this is an attempt not to do what equity would compel, viz. to let in this creditor equally with the rest, but to pay the rest to his exclusion: which cannot be done. An executor may, indeed, pending an action against him by one creditor, confess a judgment to another in equal degree, provided he do it before he is compelled to plead to the action; because up to that extent the law allows him to

(a) 1 Camp. N. P. C. 148. *Brady v. Sherk*.

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give a preference. And in many instances an executor may give a very wise and honest preference; for as to some he may be satisfied of the debt, but as to others may require further time to consider. But this is not a case where the executrix has given a fair legal preference by confession of a judgment to the other creditors; for *M.*, to whom the judgment for 1990*l.* was confessed, was a creditor only for 9*l.*, and the other creditors were only simple contract creditors, and their debts did not become of a higher nature by the judgment confessed to *M.* on their behalf. As the executrix therefore could not have paid them herself, so neither can she make *M.* the instrument of doing that for her which she herself was incompetent to do. I agree with the Court on the other point respecting the departure, but the first is the main and substantial question.

Judgment for the Plaintiff. (a)

The rule that a voluntary appearance shall be of none effect unless some process be sued out within 14 days after such appearance, cannot be taken advantage of by any but the defendant unless some particular fraud is alleged.

(a) In the course of the argument Lord *Ellenborough* referred to the case of *Mackreth v. Jackson*, executrix, *B. R. Hil. 25 Geo. 3.* We have been favoured with the following note of that case from a MS.:

The defendant pending this action confessed judgments to different creditors of the testator, which she pleaded to the action. No process had been sued out in the actions upon which the judgments were confessed.

Law, for the plaintiff, moved to set aside these judgments, relying upon a rule of *Trin. 4 W. & M.* That if defendant shall voluntarily appear at the suit of any plaintiff in any action here in court, such appearance shall be of none effect, unless some process be sued out within 14 days next after such appearance. He contended that such confession, &c. to particular creditors was an undue preference.

Per Curiam. The plaintiff who is a stranger to these actions, is not entitled to take advantage of that rule without some particular fraud which is not alleged.

Rule refused.

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GRAHAM and Another *against* GRILL.Monday,
May 17.

THE plaintiffs sued out an original against the defendant, upon an affidavit of debt, on the 31st of *October* 1811; in which month the defendant left the kingdom, and the plaintiffs proceeded to outlawry. In *December* 1812, a commission of bankruptcy issued against the defendant; and in *Hilary* vacation last he returned to England and surrendered to his commission; and on a former day, in this term, obtained a rule for reversing the outlawry upon putting in bail in the alternative, *i. e.* to satisfy the condemnation money, or to render the principal.

The court upon motion reversed the outlawry of the defendant in a civil suit upon his putting in bail in the alternative, to satisfy the condemnation money, or render the principal, and paying all costs, including costs, if any, in the Court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money absolutely.

Taddy upon shewing cause, contended that it was reasonable in this case, that the bail should be required to enter into a recognizance to satisfy the condemnation money absolutely and not in the alternative, on account of the delay which had been caused by the defendant, and because this was an application to reverse the outlawry upon motion. He said there was not any case in which the Court upon motion had granted the application in the form now prayed, and he cited *Matthews v. Gibson* (a). The distinction is between reversal upon motion and writ of error. All the cases on this subject, with the exception of one in *Salkeld* (b), are collected in *Havelock v. Geddes* (c), where indeed the court allowed the defendant to put in bail in the alternative; but that was upon error brought, and Lord *Ellenborough* C. J. in delivering the judgment took the distinction, saying, "If a party ask of the Court to interfere by motion,

(a) 8 *East*, 527. (b) *Salk.* 496. *Symmons v. Bingoe.* (c) 12 *East*, 622.

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where he has no right to their interference, but only upon error brought, they may in that case impose upon him what terms they think just."

Marryat, contra, insisted that there had not been any real delay; for if the plaintiffs had recovered judgment in the usual course, and taken the defendant's goods in execution, the assignees would have been entitled to recover them back, because the act of bankruptcy must have been committed previously to the defendant's leaving the kingdom, and therefore before the plaintiffs' action. It is a mistake to suppose that the Court has not entertained applications of this kind upon motion; the old mode certainly was by bringing writ of error and appearing in person, but that is dispensed with by the stat. 4 and 5 *W. and M. c.* 18., which was passed for the more easy reversal of outlawries.

LORD ELLENBOROUGH C. J. It appears to us, that the Court, upon motion, may exercise their discretion, as to what terms they will impose upon the party. Whether the defendant had remained in *England* or gone abroad, he would have been equally a bankrupt. It is reasonable, however, that the plaintiffs should be put in statu quo; we think, therefore, that upon payment of all costs, including any which may have been incurred in the Court of Exchequer, this rule should be made

Absolute.

1813.

The KING *against* The Justices of DEVON.Monday,
May 17.

A Rule was obtained last term for a mandamus to the justices of *Devon*, to receive an appeal made against a distress for non-payment of a sum of money assessed under the highway act. The material facts in support of the rule were these; that the party assessed having refused to pay such assessment, a warrant of distress was signed and granted by two justices on the 4th of *December*, which was executed upon his goods on the 12th, the party thereupon gave notice of appeal within six days after the 12th of *December*. At the sessions it was objected that the notice of appeal ought to have been within six days after the date of the warrant and not the execution of it, and the sessions being of that opinion dismissed the appeal.

The notice of appeal required by 13 G. 3. c. 78. §. 80. against a distress for non-payment of a highway rate, may be within six days after the levy, and need not be within six days after the granting the warrant of distress. The notice of appeal need not disclose the grounds upon which the appellant objects to the regularity of the distress.

Harris now contended that the justices at sessions had done right, inasmuch as the notice to be given by the 13 G. 3. c. 78. §. 80. within six days after the cause of complaint arose, must be intended of the six days subsequent to the date of the warrant which was the real cause of complaint, and not of the levy which was only consequent upon it: the warrant was the judicial act against which the appeal lies. He likewise took an objection to the form of the notice, that it merely stated that a distress was made without disclosing the grounds upon which it was to be contended that the distress was irregular; and he compared it to the case of notice of appeal against poor-rates, where it is necessary to state the grounds of appeal.

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Lord ELLENBOROUGH C. J. Suppose notice of action against a magistrate for taking goods, would it not be sufficient to state that he had taken the goods under a warrant, and that the party intended to bring an action thereupon? The onus lies on the other side to shew the legality of the distress; the party aggrieved need not enter into a special argument in his notice: if he point out the matter of the appeal, it will be sufficient without assigning special causes on which, perhaps, he might be turned round. Then as to the time, the party appealing was within six days after he was actually damnified. It is not necessary he should appeal on the warrant; for non liquet that it will be proceeded upon.

Per Curiam,

Rule absolute.

Gifford was in support of the rule.

Tuesday,
May 18.

WIGHTMAN *against* TOWNROE, DICKONS, THOMAS
and JAMES WATSON and ARAM.

Where the executors of a deceased partner continued his share of the partnership-property in trade for the benefit of his infant daughter: Held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves.

ASSUMPSIT against the Defendants, for not providing money for the payment of a bill of exchange, drawn by the plaintiff, at the request and for the accommodation of the defendants, with the usual money-counts. At the trial before Bayley J. at the Lent assizes 1812, for the county of Nottingham, the plaintiff recovered a verdict for 135l., subject to the opinion of the Court upon the following case:

In 1804 the defendants *Townroe* and *Dickons* entered into partnership with *W. Watson* in the trade of maltsters. In the following year *W. Watson* died, leaving an infant daughter;

ter;

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ter; and by his will appointed the three other defendants his executors, who after his death continued his share of the property in the trade *for the benefit of his infant daughter*. The trade was thenceforth carried on by the defendants *Townroe* and *Dickons* with the other defendants, the executors, for several years, but under the same firm of *Townroe* and Co. as before *W. Watson's* death; bills were drawn and accepted, and large quantities of barley bought in the course of the trade, which were manufactured into malt for sale, and every other act was done which was necessary to carry on the trade of maltsters. In making up the accounts, the executors divided the profit and loss of the business with the other partners *Townroe* and *Dickons*, carrying on the business solely for the benefit of the daughter of *W. Watson*, charging her in their account as executors with the loss, giving her credit for the profits of the trade, and *taking no part of the profits to their own use*. The business was managed by *Townroe*, and it did not appear that the executors ever interfered except in settling the accounts. The bill of exchange stated in the declaration was drawn by the plaintiff in favour of *Townroe* and Co., at the request of *Townroe*, and for the use of the firm of *Townroe* and Co., [upon an undertaking which they did not fulfil, to provide money for it when it should become due. It was afterwards indorsed by *Townroe* in the name of the firm of *Townroe* and Co., and was paid away in discharge of a debt of the firm. The question for the opinion of the Court is whether *T. and J. Watson*, and *Aram*, by taking a share of the profits as executors or trustees for the infant, did or did not become personally liable as partners in the trade. If the Court shall be of opinion

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in the affirmative, the verdict to stand ; otherwise a nonsuit to be entered.

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Copley for the plaintiff contended, that the executors were personally liable as partners. He observed upon the facts that they were executors and trustees appointed by the will of the testator, and in them therefore the legal title to the personalty vested ; and they continued it in the trade, and received their proportion of the profits, and were accountable for the losses ; consequently they answered to the character of partners in every respect ; and the subsequent disposition of the profits in favour of the infant could not vary their liability. A court of law cannot regard trusts ; and therefore whether they took the profits for the benefit of themselves or that of the infant, their liability at law was the same. This fully appears from the case *Ex parte Garland* (a), which although in its decision not precisely the same, in its language is decisive. There the testator, who was a miller, directed that his trade should be carried on by his widow, whom he appointed one of his executors, and that a certain sum should be paid her out of his personal estate for that purpose : And the widow (executrix) having become bankrupt, the question was whether the general assets beyond the fund embarked in the trade were liable ; and it was holden, that they were not ; but upon the liability of an executor who enters into trade, the language of the Lord Chancellor is extremely strong. He says, “ the case of an executor “ is very hard. He becomes liable, as personally responsible, to the extent of all his own property, and also

(a) 10 Ves. 110.

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“ in his person, and may be proceeded against as a bankrupt, although he be but a trustee.” And although it may be said in that case the executrix carried on trade in her own name, which is not the case of these executors; still an executor may become liable as a partner in trade by embarking his property, and sharing in the profits and losses of such trade, as well as by making himself ostensibly a partner. And it will be found that the language of the Lord *Chancellor* was general, and not confined to the responsibility alone of an executor, which arises from his holding himself out to the world as a partner. So in *Barker v. Parker* (a), Lord *Mansfield* said, “ executors eo nomine do not usually carry on trade: if they do so, they run great risk; and without the protection of the Court of Chancery they would act very unwisely in carrying it on.” Now this risk can only mean their being personally liable. Considered in a court of law, the benefit of the trade must be taken to result to the executor; although it may be reaped ultimately by the cestui que trust, through the medium of a court of equity.

Reader, contra. There are only two ways by which a person can be made liable as a partner; first, by beneficially participating in the profits, in which case, it must be admitted, he will be liable, although he does not appear to the world as a partner. Secondly, by holding himself out to the world as a partner, and then he will be liable, although he does not share in the profits. The doctrine laid down in *Ex parte Garland*, and *Barker v. Parker*, carries the liability of executors no farther:

(a) 1 T. R. 295.

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in the former the business was conducted by the executrix in her own name, and she was known to the world as the trader. No doubt, if an executor will enter into such a situation, he will be liable, although trading with the funds of the testator, and although he reserve no profits to his own use. On the other hand, a dormant partner, who shares the profits, is liable. But here the executors never traded in their own names, for the trade was continued under the same firm as before; and never became beneficially interested in a share of the profits; nor did they interfere in any way, except by accounting for what was due to the infant. If this then can be considered as amounting to a partnership, every executor, who permits the fund of his testator to remain in the trade, will become a partner. As to the legal title to the property being in the executors, that will not make them partners. Suppose one of several partners becomes bankrupt, the legal property in his share passes to his assignees; but can it be contended that thereby they would become partners with the solvent members of the firm? If not, neither will these executors. If it were otherwise, great inconvenience would follow.

LORD ELLENBOROUGH C. J. The fund subsisting at the death of the testator, under a due administration of the will, should have been disposed of by the executors, and converted into money, and distributed as assets. Instead of that, it is embarked de novo in the trade in the purchase of other barley, and a variety of other contracts, to which the infant is not privy, nor bound by them, but may renounce when she comes of age, as
damnosa

damnosa hæreditas. If then the infant has such an option, who but the executors can be liable?

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GROSE J. The difficulty is if the executors are not liable, to say who is.

LE BLANC J. The fallacy lies in the argument, that the executors are not concerned in the profit and loss. It is true they do not receive any thing for themselves, but carry their receipts to the account of the infant; but supposing this trade had proved a losing concern, the infant would not have been liable, for the executors could not bind her. In an indictment for larceny, the property must have been laid in the executors: so, if an action had been brought for it, it must have been in their names. It seems to me that the executors, by embarking the property in trade in the first instance, contracted a responsibility in a court of law, which their subsequent application of the profits to purposes not of personal benefit, cannot afterwards vary.

BAYLEY J. The executors in this case are mere volunteers. At law they became the legal proprietors in respect of every thing belonging to the trade; and consequently are liable to the legal debts.

Judgment for Plaintiff.

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Tuesday,
May 18th.

GLADSTONE and Another against CLAY.

Where a policy of assurance was on goods at and from Pernambuco to Maranham and from thence to Liverpool, beginning the adventure on the goods from the loading thereof, on board the ship *wheresoever*: Held that it would cover goods previously loaded at Liverpool, and which arrived at P., but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from P. to M.

THIS was an action upon a policy of assurance on goods, on board the *Blanchard*, at and from Pernambuco to Maranham, and at and from thence to Liverpool, beginning the adventure upon the said goods from the loading thereof, on board the said ship, *wheresoever*, &c., with liberty for the said ship to touch at any ports whatsoever and wheresoever, &c., and by a memorandum indorsed on the policy, the insurance was declared to be on goods or specie, both or either, valuing cotton at 10l. per bale, and the milrea as converted at Pernambuco at 75d. or 6s. 3d. each. At the trial before Bayley J. at the London sittings in last Trinity term, a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:

The plaintiffs, who were owners of the ship *Blanchard*, in the beginning of the year 1811 loaded her at Liverpool with British manufactured goods to the amount of 5000l. for Pernambuco. By the bills of lading, the whole of the said goods were to be delivered there, and the instructions to the plaintiffs' agents were to sell the whole at Pernambuco, and to send the vessel back from thence to London. The ship sailed from Liverpool upon this voyage on the 24th of January 1811, and arrived at Pernambuco on the 15th of March following. She remained there for the purpose of disposing of the outward cargo about five weeks, during which time the whole was disposed of and landed, except twenty-six cases of manufactured goods, of which the agents for the plaintiffs being un-

able

able to dispose at *Pernambuco*, or to obtain freight there for *London*, resolved to send the ship with the twenty-six cases of goods to be disposed of at *Maranham*; and that she should proceed from thence to *Liverpool*. The said agents put on board at *Pernambuco* on account of the plaintiffs, a considerable quantity of specie, fustic, and other goods, to be carried to *Maranham*, and from thence to *Liverpool*; and the twenty-six cases of the outward cargo were never unloaded at *Pernambuco*, but remained constantly on board the ship until the loss. On the 28th of *April* she sailed from *Pernambuco* for *Maranham*, and on the fourth of *May*, while proceeding for that port, was totally wrecked; whereby all the goods on board sustained a partial damage. The plaintiffs have been paid the loss upon the goods shipped at *Pernambuco*, and a sufficient sum as a return of premium for short interest, if the policy did not attach upon the twenty-six cases of the outward cargo.

The action was brought for the loss sustained upon the twenty-six cases of the outward cargo, the amount of which was agreed to be settled out of court, if the plaintiffs were entitled to recover. The question for the opinion of the Court is, whether the policy of assurance on the homeward voyage attached upon the said twenty-six cases of outward cargo so loaded at *Liverpool*. If the Court should be of opinion that it did attach, the verdict is to stand for such sum as shall be adjusted out of court, if not a nonsuit is to be entered.

Campbell for the defendant was called upon by the Court, who contended, that notwithstanding the adventure

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venture was to commence from the loading of the goods wheresoever, still it could not be considered within the meaning of the policy, that any part of the outward cargo should be protected by it. The underwriter at the time of his subscription, could not have contemplated that on a voyage from *Pernambuco* to *Liverpool*, goods loaded at *Liverpool* were to be the subject of his insurance. Neither could the assured have foreseen that a part of the outward cargo would remain unfold, so as to render such an insurance necessary. That the parties looked to a cargo which should be loaded at *Pernambuco* is apparent from the valuation being only upon cotton and milreas as computed at that place, and not upon any of the cases of goods which composed the outward cargo. He cited *Hodgson v. Richardson* (a), and *Spitta v. Woodman* (b), as a stronger case in favour of the assured than the present; because there the underwriter, at the time of his subscribing the policy, was aware that the goods were in a loaded state at an anterior port; and yet upon a policy beginning the adventure from the loading of the goods, it was held a good objection that they were not loaded at the port from which the voyage was to commence. With respect to the word *wheresoever* in this policy, it must be construed like the words "any port whatsoever," which are confined to ports within the limits of the voyage: it only means wheresoever in the course of the voyage insured the goods may be loaded. It was used for the purpose of covering any goods which might be loaded either at *Maranham* or on the coast of *Brazil*. If it is to be extended farther, it may be asked when did the

(a) 1 *Black.* 463.(b) 2 *Taunt.* 416.

policy attach upon these goods? Surely not at the moment of the ship's arrival at *Pernambuco*, for the goods were designed for the market at that place. The underwriter could not be liable whilst it remained uncertain whether the goods would be disposed of, or would form a part of the homeward freight. And supposing he would be liable when that was determined, still, unless it was shewn that at that time the goods were in good safety at *Pernambuco*, the underwriter might be made liable for anterior damage. He then referred to *Parkin v. Tunno* (a), *Horney v. Lushington* (b), *Langborn v. Hardy*, *Same v. Cologhan*, C. P., in which last cases *Spitta v. Woodman* was recognized; and urged that it would be overruling all those cases to decide in favour of the plaintiff.

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LORD ELLENBOROUGH C. J. In this case the assured have industriously laboured to withdraw themselves from the possibility of any cavil arising out of the construction or misconstruction of former cases. Being resolved to cover their interest whether the goods should be loaded on board at *Pernambuco*, or whether the unexhausted residue of the outward cargo should happen to form a part of that which should become destined for the homeward voyage, they very rationally, with reference to the late decisions, introduced the word "wheresoever." We well know that in adventures of this kind to the coast of *South America*, it has frequently happened that a portion of the outward cargo remains undisposed of at the destined market, and the ship is obliged to return home with the same goods. No doubt this insurance

(a) 11 East, 22.

(b) 15 East, 46.

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looked to a case of that fort, and was meant to protect it. It is therefore provided that wheresoever the loading takes place the policy is to attach; the word "wheresoever" being, as to the place of loading the goods, a word of the largest extent; but not enlarging the extent of the damage, for which the underwriter is to be liable, which still must be confined to damage accruing within the limits marked out by the policy, viz. from *Pernambuco* to *Liverpool*. It has been asked at what time the risk attached upon these goods: to which it may be answered, either from their arrival at *Pernambuco*, or at all events from the time when they were destined for the homeward voyage. It certainly throws some difficulties in the way of this construction, and that affords the only ground of argument, that it may possibly aid in covering a damage which happened to the goods before the commencement of the risk. But when we consider that the assured is bound to prove that the loss happened within the limits of the voyage insured, that difficulty is in a great measure removed. Here the damage is stated to have arisen from wreck between *Pernambuco* and *Maranham*. Under these circumstances, unless we are to pronounce that it is not competent to the parties to a policy, by the introduction of words of the most general and comprehensive meaning, to protect an interest on goods without reference to any particular limits within which they are to be loaded, so that at whatsoever place they may be loaded, if the damage arise within the voyage insured, the underwriter shall be liable; I cannot conceive any words more effectual for attaining that object than the words here used.

GROSE J. It is impossible to recollect what was decided in the former cases, and not perceive with what view the word "wheresoever" was introduced into this policy.

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LE BLANC J. If the consequences announced in argument, namely, the overruling all former cases upon the subject, were likely to follow from this decision, I think the Court would pause before they proceeded to such a length; but none of the cases, from *Robertson v. French* (a) down to *Langhorn v. Hardy*, contain words similar to the present. Therefore this decision will not affect other contracts framed in different terms. The words in former cases were either beginning the adventure from the loading on board the ship, or from the loading at the place where the risk was to commence, or from the loading as aforesaid, which are words of reference; but I am not aware that the Court has been called upon to decide a case where the words were the same as or equivalent to the present. The words here are from the loading on board wheresoever. The only question is whether the Court will give effect to the word "wheresoever," by construing it any place whatsoever, or will restrain it to *Pernambuco*, and such places as the ship might touch at in her voyage from *Pernambuco*. It is stated that the damage arose, not at *Pernambuco*, but in the course of the voyage from that place; therefore it becomes unnecessary to fix upon the precise point of time when the policy attached: it will be time enough to determine that, when the question arises. Then the word wheresoever seems clearly to have been

(a) 4 East, 130.

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intended to take it out of the former cases, where the policy was either left in blank, or filled up with a place. The underwriter, when he read the policy, cannot be supposed to have read the word wheresoever as it is used with reference to the loading of the goods, in the same sense which it bears when applied to the liberty to touch at any ports. It therefore seems to me that the Court is bound to give it the most extensive signification, so as to meet the intention of the parties.

BAYLEY J. The object of the insurance was to cover the goods in the course of the voyage insured. It makes little difference to the underwriter whether the goods are loaded on board in the course of the voyage, or whether the outward cargo is converted into a part of the homeward cargo. In the former cases, the Court was tied down by the express words of the policy, contrary to the intention of the parties; for, in some of them, the underwriters knew perfectly well that it was the object of the assured to load the goods before the commencement of the risk. Here, it being probable that a portion of the outward cargo might be returned on hand, a very extensive word was therefore introduced. Wheresoever may mean either wheresoever in the course of the voyage, or in a larger sense, wheresoever, without confining it to the voyage. If it may have both senses, why may it not have the larger? more especially, if such appears to have been the intention of the parties. As to the question when the policy attached, it is not necessary to determine the exact point of time, whether it was when the assured resolved not to unload any more of the goods, but to send the remainder on to *Maranham*; but I should say that it clearly attached when the ship left *Pernam-*

Pernambuco. The question, when the assured changed the outward into a homeward cargo, would be for a jury; and when they were satisfied that it constituted a part of the homeward cargo, then the policy would attach. It is said that then the underwriters might be liable for antecedent damage; but I think not. The assured is bound to prove that the damage occurred during the voyage covered by the policy: if that was left in doubt, he would not be entitled to recover. He can only recover in respect of such part of the cargo as was found at the time when the policy attached. As to that the onus is on the assured.

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Judgment for Plaintiff. (a)

Scarlett was for the Plaintiff.

(a) See 16 *East*, 240, *Bell v. Holson*.

DOE, on the Demise of EMMETT, *against* THORN.

Tuesday,
May 18th.

EJECTMENT for lands in the parish of *Ealing* in the county of *Middlesex*. Demise laid 26th *April* 1811.

At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after *Michaelmas* term 1812, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

On the 26th *November* 1805 the lessor of the plaintiff being possessed of the premises in question, under a lease granted to him for a term of 14 years of which several were then unexpired, and being also indebted to one *Bullen* in a sum of money, the payment of which was

If the Sheriff sell a term under a writ of *fi fa.* which is afterwards set aside for irregularity and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the Sheriff.

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against
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secured to *B.* by a warrant of attorney, *B.* signed judgment thereon, and issued a *fiери facias* directed to the sheriff of *Middlesex* to levy 320*l.* on his (the lessor of the plaintiff's) effects. The sheriff accordingly took the said lease and sold it under the execution to the defendant for 500*l.*, and afterwards assigned it to him and delivered possession; and the defendant continued in possession at the time of bringing this ejectment. Soon after the sale, it being discovered that the execution was irregular, a rule was obtained and made absolute in this court in *Trinity* term 1806, directing that the writ of *fiери facias* and the levy under it should be set aside for irregularity with costs; and that the money levied and in the hands of the sheriff should be returned to the lessor of the plaintiff; except as to the amount of a debt to be paid by him to the plaintiff in another action, then pending against him.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover. If the Court should be of this opinion, the verdict is to stand; if not, a non-suit is to be entered.

Espinasse for the plaintiff, contended that the authority of the sheriff which was derived from the writ of *fiери facias* was vacated as soon as the writ was set aside, for by setting it aside, it is as if the writ had never been, and consequently the sale under it became void; and he referred to *Turner v. Felgate*, (a) where the plaintiff was permitted to recover in trespass against the defendant for taking his goods upon an execution which was afterwards set aside for irregularity.

(a) *T. Raym.* 73.

LORD ELLENBOROUGH C. J. Is the lessor of the plaintiff entitled to hold the money paid as the price of his term, and to recover the term also? In the very case cited, the plaintiff afterwards brought *scire facias* to have restitution of his goods taken under the execution, for which he had already recovered damages : but the Court superseded it, as being a very unreasonable thing that he should have double satisfaction. Here the judgment was not set aside ; therefore a fresh execution might have been sued out on the very same day. The term was legally sold, for the sheriff had authority to levy the money, and the property passed by the sale.

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Bayley J. The lessor of the plaintiff agreed by the rule to take the money ; it was his own fault therefore if he did not. In the case cited trespass could not have been maintained against the sheriff.

Per Curiam,

Judgment of Nonsuit.

Gurney for the defendant, mentioned several authorities (b) to shew that a party shall not be restored to his term again after a sale by the sheriff under a *fieri facias*.

(b) *Dyer* 363. pl. 24. 5 *Rep.* 90, b. 8 *Rep.* 96, b. 143. But it seems otherwise if the term be extended upon elegit, or forfeited on outlawry and sold, and the judgment or outlawry be reversed. *Gre. Fac.* 246. *Cro. Eliz.* 278.

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Tuesday,
May 18th.

DOE, on the Demise of SARAH BORWELL, *against*
ABEY.

Devise to the three sisters of the testator for and during their joint natural lives, and the natural life of the survivor, to take as tenants in common and not as joint tenants; Remainder to trustees during the respective lives of the sisters and the life of the survivor, to preserve contingent remainders; and from and after their respective deceases and the decease of the survivor remainder over: Held that the sisters either took the estate as jointenants to be regulated in its enjoyment as a tenancy in common; or as tenants in common with benefit of survivorship.

EJECTMENT for certain freehold lands in the parish of *Grasby* in the county of *Lincoln*. A verdict was found for the plaintiff before *Grose J.* at the last assizes for the said county, subject to the opinion of the Court upon the following case:

William Borwell being seized in fee of the premises in question by his will dated the 6th of *April 1777*, after devising all his messuages, cottages, lands, tenements, and hereditaments, &c. to his wife for and during her widowhood, or until such child as he should happen to have by her should attain 21, remainder to trustees during the continuance of such estate to preserve contingent remainders, remainder to the use of all and every his sons and daughters on the body of his said wife, begotten or to be begotten, and the heirs of the body of such sons and daughters severally and respectively as tenants in common and not as joint tenants; and in case any of such sons or daughters should happen to die without issue, the share of him, her or them, so dying without issue, to the use of the survivors or survivor, and of the heirs of his, her, or their bodies as tenants in common and not as joint tenants; and for default of such issue he devised thus: "I give and devise all
" my said messuages, cottages, lands, tenements, and hereditaments unto my three sisters *Elizabeth Richardson*,
" *Mary Whitehead*, and *Sarah Borwell*, for and during
" their joint natural lives and the natural life of the survivor
" of them, to take as tenants in common and not as joint
" tenants.

“ *tenants.* And from and after the determination of their
 “ *respective* estates, then to my said trustees and their heirs
 “ during the *respective lives of my said three sisters and the*
 “ *life of the survivor of them,* upon trust, by the ways and
 “ means aforesaid, to preserve the contingent estates herein-
 “ after limited from being defeated or destroyed; and from
 “ and after *the respective deceases of my said three sisters and*
 “ *the decease of the survivor of them,* then as to one undivided
 “ third part of the said premises to the use of my nephew
 “ and niece, *John and Mary Richardson,* son and daughter
 “ of my sister *E. Richardson,* respectively for and during
 “ their respective lives as tenants in common and not as
 “ joint-tenants;” remainder to trustees to preserve contin-
 gent remainders; remainder after the respective deceases
 of the testator’s said nephew and niece, to the use of the
 children of the said nephew and niece in tail general, with
 remainders over. And as to another undivided third part
 from and after the deceases of his said three sisters and the
 survivor of them, to the use of the children of *M. White-*
head in tail general, with other remainders over. And as
 to the remaining undivided third part from and after the
 respective deceases of his said three sisters and the survivor
 of them, to the use of the children of *S. Borwell,* with
 other remainders over. The will also contained a bequest
 of personal property to the three sisters in the following
 terms: “ I give and bequeath to my said three sisters the
 “ sum of 20*l.* a-piece, to be paid to them respectively by
 “ my executrix hereinafter named, within 12 calendar
 “ months next after my decease. And my will is, that in
 “ case any of my said three sisters shall happen to die
 “ before her or their legacy or legacies shall become payable
 “ as aforesaid, that then the legacy or sum of money
 “ hereby intended for her or them on her or their so dying,

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“ (whether the same be originally given, or shall afterwards
 “ come to her or them by survivorship, in pursuance
 “ hereof,) shall go to and be equally divided among the
 “ survivors of them if more than one; but if but one to
 “ such survivor only.” — The testator appointed his
 widow sole executrix of his will. *M. Whitehead* died
 without issue in 1778, in the lifetime of the testator.
 The testator died seized on the 20th of *June* 1783,
 without issue, and without altering or revoking his will;
 upon whose death his widow entered, and continued to
 hold the premises until her second marriage in 1790;
 when the lessor of the plaintiff and *E. Richardson*, the
 two surviving sisters of the testator took possession and
 demised the premises to the defendant, who paid rent
 to them in moieties. *E. Richardson* died some years ago,
 and after her death, the defendant married her daughter
M. Richardson mentioned in the will, and has continued
 to pay rent for a moiety of the premises to the lessor
 of the plaintiff. *J. Richardson* the testator’s nephew, also
 mentioned in the will, died without issue in his mother’s
 lifetime. The defendant was in possession of the pre-
 mises when the ejectment was brought, but had been
 regularly served with a notice to quit by the lessor of
 the plaintiff; at the expiration of which notice the pos-
 session of the whole of the premises was demanded and
 refused. The defendant entered into the common con-
 sent rule to defend without confessing ouster, unless an
 actual ouster of the lessor of the plaintiff should be
 proved; and no actual ouster of the lessor of the plaintiff
 was proved, except as above stated. The question for
 the opinion of the Court is, whether the plaintiff is en-
 titled to recover.

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 Don
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Copley for the lessor of the plaintiff, who claimed the whole of the premises as the sole surviving sister, proposed to read the devise as if it had been to the three sisters, for and during their joint natural lives and the natural life of the survivor, without the subsequent words "to take as tenants in common and not as joint tenants:" which being inconsistent with the former part of the devise, and also repugnant to the general intent of the testator, the Court will intend that they crept in by mistake; and, according to an established rule of construction, reject them. The general intent was, that the limitation over should not take effect until after the death of the survivor of the three sisters; which is apparent from the limitation to the trustees to support contingent remainders, not merely during the respective lives of the sisters, which would have been enough if he intended them to take as tenants in common; but during their respective lives and the life of the survivor. Again, the three parts are not to go over in succession as the lives of each of the sisters dropped; but the whole is to go over in undivided third parts upon the death of the survivor of them. And in *Furse v. Weeks* (a) it is laid down that in a will, although there be words which shew an intent to create a tenancy in common, yet if there be other words which shew a stronger intent to create a jointenancy, such interpretation shall prevail. And in a former clause of this will where the testator meant that his sons should take as tenants in common, he has so provided in unambiguous terms. Then the devise of the real estate may be explained by that of the personal, where the testator plainly creates a

(a) 2 Roll. Abr. 90. pl. 5.

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survivorship amongst the sisters :¹ and such a disposition of the personalty was much relied upon by Lord Hardwicke in *Hawes v. Hawes* (a), to explain a devise not very unlike the present, upon which he held that the devisees took by survivorship. And perhaps all the words of this will may be reconciled by giving the sisters the benefit of survivorship, although they may take as tenants in common.

J. Balguy, contra. Although it may be admitted, that if there are inconsistent and contradictory words in a will, the Court will reject some of them ; yet if a reasonable construction can be given to the whole, such construction shall rather prevail. The first words by which it is given to them and the survivor of them certainly import a jointenancy ; but the subsequent words denote a plain intention, that they shall take as tenants in common ; and the word survivor shall not destroy or control this plain intention. And so it was adjudged in *Blisset v. Cranwell* (b), upon a devise to two and their heirs, and the longer liver of them, equally to be divided ; which is not so expressive of a tenancy in common as the present ; and the same was ruled in *Stones v. Heartly* (c). But it is said that it may be a tenancy in common with benefit of survivorship ; which is the same argument that was used and rejected by Lord Mansfield as too refined, in *Rose v. Hill* (d) ; and the Court there considered the word survivor, as inserted to prevent a lapse, and to mean such as survived the testator. As to *Hawes v. Hawes*, the words were “ with benefit of sur-

(a) 1 Wils. 166.

(c) 3 Burr. 1886. cited in *Rose v. Hill*.

(b) 3 Lev. 373. S. C. Salk. 226.

(d) 3 Burr. 1881.

“vivorship,” which necessarily implied survivorship among themselves. Here are no such words; and if the estate did not survive upon the death of *E. Richardson*, the defendant will be entitled to her moiety as special occupant. The clause relating to the personality shews that the testator knew how to use apt words to create survivorship where he so intended.

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 Asty

LORD ELLENBOROUGH C. J. This is the case of a testator who has unfortunately fallen into the use of technical expressions, which he did not fully comprehend. It remains for us to say, whether amidst this cloud of obscurity which he has thus raised, we can collect his meaning. I think the cardinal point, upon which we may rely in order to collect his intention, turns upon the words preceding the limitation over and upon which it is given, which are these, “from and “after the respective deceases of my said three sisters, “and the decease of the survivor of them.” That is the time, and it is not before that time, when the remainder over is to take effect. Now, unless the sisters take by survivorship, what is to become of the respective portions of the estate in the interval? The learned counsel has suggested, that the heir would take them as special occupant; but it seems to me, that there is no occasion to resort to such an expedient; for the whole will is made intelligible by construing the words, to take as tenants in common, as rather regulating the mode of enjoyment, than as describing the precise estate which the sisters should take. The words are, “unto my three sisters for and during their joint natural lives and the natural life of the survivor, to take as tenants in common, and not as joint tenants.” To take as tenants
 in

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in common is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to enjoy it as tenants in common, which they might do with benefit of survivorship, then the only repugnancy seems to be in the words, and not as jointenants. I would preserve the words to take as tenants in common; the words tenants in common are of flexible meaning, and may be understood, that although they should take by survivorship as jointenants, yet the enjoyment was to be regulated amongst them, as tenants in common. The prevailing intention of the testator seems to have been that the estate should not go over until the death of the survivor. The words upon which I commented and relied in the outset, clearly manifest such an intention.

GROSE J. I think the construction which my Lord has put on the will comes the nearest to the testator's intention.

LE BLANC J. The testator having restrained the limitation over "until after the death of the survivor," makes the case somewhat different from what it would have been, if the devise had been confined to the sisters themselves. In the cases cited for the defendant, there were no limitations over to help the construction. The bequest of the personalty is properly prayed in aid as a key to the meaning of the testator, that he intended that the sisters should also take the real estate in survivorship.

Bayley J. The fair construction is to treat it as a devise to the sisters as tenants in common with benefit of

survivorship, and thereby give effect to all the words. A tenancy in common with benefit of survivorship is a case which may exist, without being a jointenancy; because survivorship is not the only characteristic of a jointenancy. There is one view in which it might be important to the testator to create a tenancy in common with survivorship, and yet not a jointenancy. It might be important in this view, because if it were a jointenancy, one jointenant might by means of a lease made during her life, convey to her lessee a title paramount to that of the survivors. It might therefore be the object of the testator to obviate such a consequence which would in effect defeat his intention.

Postea to the Plaintiff.

The KING *against* MATHIAS KERRISON.

Wednesday,
May 19th.

ERROR to reverse a judgment on an indictment, given by the justices at the quarter sessions for the county of *Norfolk*, against the defendant for not repairing a common bridge. The indictment stated in the first count, that a certain common and public bridge over a navigable cut, channel, canal, or watercourse, in the parish of *Ditchingham* in the county of *Norfolk*, in a certain highway there was and yet is in great decay, &c.; and that the defendant, *by reason of his being the owner and proprietor* of the navigation mentioned in a certain act of parliament, made in the 22d year of the reign of *Car. 2.* intituled “an act for making navigable the rivers commonly called *Brandon* and *Waveney*,” ought to repair and amend the said common bridge, &c. The 2d count charged that

a certain

Indictment charging an individual with the repair of a bridge *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought, it will be reversed. It seems that a count charging him by reason of being owner of a navigation under a *private* act of parliament, must set forth the act.

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a certain common and public bridge over a navigable cut, channel, canal, or watercourse, in the parish of *Broom* in the county of *Norfolk*, in a certain highway there was and yet is in great decay, &c. ; and that the defendant *by reason of his being owner and proprietor of the said navigation* ought to repair, &c. The last count charged that there was and still is a certain highway &c., and also a certain common and public bridge in the said highway over a certain canal, &c., and that the said bridge was and yet is in great decay, &c. ; and that the defendant *by reason of his being owner and proprietor* of a certain navigation in, through and along the said canal, of right ought to repair, &c. Plea not guilty. The common errors were assigned.

Abbott in support of the writ of error, took several objections. To the first count, that the act of parliament being a private act, should have been set forth, as the Court could not take judicial notice of it. To the second count, which charged the defendant, by reason of his being owner of *the said navigation*, that if the words *said navigation* were to be taken as referring to the navigation in the first count, it was open to the same objection as the first : if they referred to the navigable cut mentioned in the inducement to the second count, it came within the objection to the last count. To the last count he objected, that the allegation by reason of being owner and proprietor of a certain navigation, does not amount to any legal obligation upon the defendant to repair. This will be apparent by reference to a few principles of law. By the common law, the county is chargeable with the reparation of public bridges, in the same manner as the parish is with that of

public highways. An individual may become chargeable with the repair of either, by reason of the tenure of lands or tenements (a). In 1 *Hawk. c. 76. f. 8.* it is laid down "that a corporation aggregate may be bound by force of a general prescription that it ought and hath used to repair, without shewing that it has been used to do so in respect of the tenure of certain lands or for any other consideration; but an individual cannot be charged with such a duty by a general prescription from what his ancestors have done." It is, however, added, "that an indictment charging a tenant in fee simple with having used of right to repair such a way *ratione tenuræ* is certain enough, without adding that his ancestors, or those whose estate he hath, have always so done, for that is implied in such charge;" and *Rex v. Spiller* (b) is to the same effect. According to these authorities, therefore, it appears that the words *ratione tenuræ* are equivalent to charging the individual in a que estate; it is a concise form, importing that he holds the land on the service of repairing, and that the land was originally granted to him on that condition. [Lord *Ellenborough* C. J. asked if ownership was not also a compendious expression, comprising the entire interest in the soil as well as the tenure upon which it is holden]. Owner and proprietor import neither tenure nor service; at the utmost, they import only the entire interest free of any condition, and not a grant of the land upon condition. The term *ratione tenuræ* is become a known term of art; which like other terms of art has its peculiar meaning; and in some cases they cannot be supplied by any periphrasis; as in an indictment for

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(a) 2 *Lift. 700.*(b) *Styles, 109.*

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murder *malitiâ præcogitatâ* without *murdravit* would not be sufficient; and yet the killing with malice aforethought is murder. Here it is enough to have shewn that the substituted form is not equivalent. Under the allegation of *ratione tenuræ*, evidence must have been given to shew that the land was holden by the service of repairing the bridge; the present form would have been satisfied by proof of the defendant being owner of the navigation.

Best, contra. No case has determined that the words *ratione tenuræ* are technical expressions which cannot be dispensed with, or supplied by others of equivalent import. The question is whether these words are not equivalent. Now owner and proprietor in respect of a navigation, are the same as tenant in fee in respect of land; they import a holding, and an entirety of interest, as is admitted. The rest is matter of evidence which at the trial must amount to evidence of prescription, as well upon this as upon the allegation of *ratione tenuræ*; but it is not necessary to allege the immemorial acts by which that is to be proved. This count might have concluded with the words *ratione tenuræ* without requiring any additional proof; but owner and proprietor were deemed more appropriate. That a proprietor of a navigation, as such, may be chargeable with the repairs of a bridge, appears from the cases of *Rex v. the Inhabitants of Kent* (a) and *Rex v. the Inhabitants of Lindsey* (b); and upon error, if there be any case in which the defendant may be bound to repair, that will be sufficient to sustain the indictment.

(a) 13 East, 220.

(b) 24 East, 317.

Abbott in reply. If the property in this navigation be such as not to admit of the word tenure being applied to it, that is an argument to shew that the defendant could not have been charged *ratione tenuræ*; and unless he could have been so charged, the obligation, being against common right, will not be good. And it seems clear that the defendant must be charged in the precise mode in which the obligation is cast upon him (a).

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LORD ELLENBOROUGH C. J. Public convenience requires that the ancient forms of alleging obligations and of pleading should be adhered to, in order to charge an individual with such a liability as the present; and that no fanciful forms should be substituted in lieu of them; at least, where any substitution is attempted, the Court before they allow it, will look with anxiety to see that it is of equivalent import. The allegation of *ratione tenuræ* itself, must at some period of time have been a novelty, by way of substitute for a more definite form of pleading a prescriptive obligation. But it has now the sanction of antiquity for being deemed equivalent. Looking then at these pleadings, let us examine whether the words here used are of like import with *ratione tenuræ*. The allegation is, that the defendant by reason of his being owner and proprietor of a certain navigation, &c., of right ought to repair. Does that phrase import any thing more, than that by reason of being owner he is liable to repair; making that a consequence of law, which is not so? No such legal consequence follows from the ownership. A person is not by law chargeable, merely as the owner of a navigation, to the reparation of a bridge. There must

(a) 2 Sazm. 160. *Rex v. Stoughton*.

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be some contract or obligation annexed to the original grant under which he takes, to induce such liability. But there is no allegation in this count of any such obligation, or of any grant from which it might be presumed to result: but the allegation is simply by reason of his being owner and proprietor. What words then are there of equivalent import with *ratione tenuræ*, i. e. by reason of an obligation resulting from an original grant? The words already cited do not appear to be; for *ratione tenuræ*, by the technical sense which has been given to them, embody the condition upon which the land was granted; these words do not. Ownership at the utmost imports only estate and quantity of interest. Suppose then the words owner and proprietor to import *liberum tenementum*, or the entirety of the interest; still there are wanting all words which import condition. It appears therefore to me, that if we were to give effect to these words, we should be adopting a fanciful deviation from an established form of pleading; and where a relaxation has already been introduced by the words *ratione tenuræ*, we are not at liberty to impart the same effect to some other words, as being equivalent. We ought not to depart from ancient forms, unless there be an adequate reason for such departure. I therefore think this form of pleading is defective.

GROSE J. If there is a substantial reason why old forms of pleading should be observed, I should be for observing them. It is contended, that by reason of being owner and proprietor is equivalent to *ratione tenuræ*. I think not, for the reasons which my Lord has so pointedly given.

LE BLANC J. It is admitted in argument, that this would be the first instance of the Court's upholding an indictment framed as this is in other than the technical language of the law; by which an individual, who is charged with the reparation of a bridge, must be charged "by reason of tenure;" or if it be the case of a corporation, it may be done by general prescription. When, therefore, a new form of allegation is attempted to be introduced, it behoves the Court, before they give sanction to it, to see clearly that the allegation is tantamount in every respect to that for which it is substituted, and which has been the long established form. Upon this subject much argument has been used to shew that the words, by reason of being owner and proprietor, are the same as *ratione tenuræ*. But I think the argument has failed in establishing that point. *Ratione tenuræ* implies *ex vi termini* something originally annexed to the holding. And this inconvenience would certainly result from the adoption of this mode of pleading; that it would let in a more lax medium of proof, and bring more of law before the consideration of a jury than is necessary; for this form would admit of the production of every species of evidence by which a person could in any way be made chargeable. The Court ought not to sanction this. Two cases have been referred to, in both of which the circumstances under which the obligation subsisted, were specially set forth in pleading: in the special pleas in those cases, the nature of the obligation is particularly set out. It would be a sufficient argument with me to decide this case, to say that the Court ought to make their stand against these innovations in the first instance.

BAYLEY J. concurred.

Judgment reversed. (a)

(a) See 2 *Ld. Raym.* 792. 804. *Regina v. Sir I. Bucknall.*

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Wednesday,
May 19th.

PRICE *against* JACKSON.

The Court set aside a latitat directed to the sheriff of *Middlesex* for irregularity.

ANDREWS shewed cause against a rule obtained by *Comyn*, for setting aside a latitat for irregularity. The irregularity was, that this was a latitat directed to the sheriff of *Middlesex*. The case of *Kelly v. Shaw* (a) was relied upon, where the proceedings were held good, though the latitat was served in *Middlesex*.

But the Court held that this practice was irregular; and *Bayley J.* added, that a latitat and a bill of *Middlesex* were issued by different officers; and if the practice could be sustained, a bill of *Middlesex* would never be issued again.

Rule absolute.

(a) 6 Term Rep. 74.

Thursday,
May 20th.

THE KING *against* THE JUSTICES OF LEICESTERSHIRE.

The Court will not grant a mandamus to the justices at sessions to rehear an appeal against an order of removal, after judgment given by them, and entered by the clerk of the peace for quashing the order;

upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake instead of an adjournment of the appeal.

The justices at sessions may alter their judgment during the continuance of the sessions.

for confirming the order; but one of the justices who made the order, being present at the hearing of the appeal, inquired of the clerk of the peace whether he was not one of the justices making the order; and being answered in the affirmative, observed that it being contrary to a rule of that court, for justices who had made orders of removal to vote on the hearing of any appeal thereon, his vote in this case must consequently be withdrawn; and therefore judgment must be for quashing, instead of confirming the order, as by taking away his vote the majority would be against confirming, and for quashing the same. The clerk of the peace thereupon entered the judgment of the Court for quashing, without perceiving at the time that by withdrawing the vote of the said justice the votes of the remaining justices would be equal; whereon, by the rules of the court, an adjournment of the appeal should have been entered, instead of a judgment to quash the order. Afterwards application was made to the chairman to rectify the judgment, but without effect. Under these circumstances a rule nisi was obtained in the last term, for a mandamus to the justices to enter continuances on the said appeal to the next general quarter sessions, and then to hear and determine the same.

The Attorney-General and *Phillipps* shewed cause, and contended, that the amended order of sessions for quashing the order of justices was final; it being competent to the sessions during their continuance to alter or amend any order previously made; in the same manner as in the superior courts during the term a rule or judgment may be amended, the term being considered for that purpose as but one day; and this Court will not

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afterwards take account of the poll, upon which final judgment was given in the court below, where, if any error had obtained, it might have been rectified.

Beauclerk and *G. Marriott*, in support of the rule, said that it appeared clearly from the affidavit that the amended order had been entered by the clerk of the peace through mistake. It was his duty, according to the case of *Bodmin v. Warligen* (a), when the vote of the magistrate making the order was withdrawn, thereby making the remaining votes equal, to have entered an adjournment; and now the sessions have no authority to proceed, without a mandamus. They also cited *R. v. The Justices of Westmoreland* (b); and said that the Court, when the rule was moved for, were inclined in favour of the application.

LORD ELLENBOROUGH C. J. I cannot say what might have been my first impression upon an ex parte statement, made at the time when the rule was moved for; but it is my duty now, after having heard both sides, to give judgment on more mature consideration. If any error was made in the entry of the clerk of the peace, that error should have been pointed out at the sessions, while the Court was sitting, and competent to reform its own errors, and to draw out a more correct judgment. If this application were entertained, the consequence would be that this Court would have on all occasions to look, not to the record alone, but to extraneous matter, in order to see how the judgment of the justices at sessions was obtained. The Court will

(a) *Mich. term, 23 Geo. 2. Bolt. 733 5th edit.*

(b) *Id.*

not do this; nor, when judgment has been finally pronounced, will they hold a sort of balloting-box to ascertain the votes that were given, or whether they were correctly cast up. If no judgment had been pronounced, the Court might have interposed; but here there is a judgment. The party who would have corrected the error should have applied to the proper forum and in due time; and if it had been found that the numbers were equal, nothing would have been done upon it; for it would have been a nullity: but here no step of that sort was taken, but judgment was entered; and this Court cannot, in order to supply a remedy, exercise a jurisdiction which does not belong to them. If they did in this instance, they must in all others instead of looking to the result, look to the poll on which the judgment is founded.

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GROSE J. It does not appear that the Court below entertained any doubt; if they had, they would have sent a case for our opinion.

LE BLANC J. It appears by the affidavits on both sides that judgment was entered for quashing the order of justices; and that this was known to the attornies on both sides; and no application was made to the Court below while sitting, to sift or inquire into the error if any such existed. But application is made to this Court, to institute an inquiry upon the question, how the numbers were composed at the time when judgment was pronounced. This Court ought not to countenance such an application; inasmuch as the error should have been noticed at the time.

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BAYLEY J. Except in matters of a criminal nature we cannot look dehors the record. This Court cannot sit as upon a scrutiny before an election committee. In *Bodmin v. Warligen* the objection appeared upon the entry of record, made by the clerk of the peace.

Rule discharged.

Monday,
May 20th.

The KING against The Justices of OXFORDSHIRE.

The 16 G. 3. c. 30., which gives an appeal to the sessions against a conviction for deer-stealing, requires the person appealing to give six days notice; and if an appeal be entered without notice, the sessions have no authority to adjourn it to the next sessions: where the sessions did so adjourn the appeal, and at the next sessions it was dismissed for want of notice, the Court refused to grant a mandamus to the justices to rehear it.

THIS was a rule for a mandamus to the justices of *Oxfordshire*, calling on them to enter continuances to their next quarter sessions, upon an appeal against a conviction under the 16 Geo. 3. c. 30. for deer stealing. The conviction was made on the 13th of *July*, and an appeal against it entered at the next *Michaelmas* quarter sessions; when, upon being called on, objection was taken that the six days notice required by *f. 21.* had not been given; and thereupon the justices entertaining doubts, respited the appeal until the next sessions, in order to consider the question. On the 6th of *January* following the prosecutor was served with notice to try the respited appeal at the *Epiphany* sessions; at which sessions the same objection was renewed, when the Court decided in favour of the objection, and dismissed the appeal.

Abbott, upon shewing cause against the rule, referred to *f. 21.*, which enacts that any person may appeal, &c. but the person so appealing is required and directed to give six days notice to the prosecutor, and to enter into a recognizance. He admitted that the appellant had entered into the recognizance required by that section, but he

he had not given notice ; whereas the giving notice is as much a condition precedent to the right of appeal, as the entering into a recognizance. Both are included in and required by the same clause ; and it is also provided that the appeal shall be to the sessions next after the expiration of 20 days from the time of the conviction ; so that there must always be time to give six days notice. As to any supposed analogy between this and the case of an appeal against a poor-rate, it is sufficient to say, that the statutes by which the latter is regulated do not specify any particular time for giving notice ; but only require notice generally, or a reasonable notice. It may be argued that the words “ but the person so appealing is required to give six days notice ” are not words of condition, but only directory ; but that argument goes too far, because it would also make the clause only directory as to the recognizance. Then the sessions had no authority to adjourn for want of notice, for the enactment clearly imports that the appeal shall be determined at the sessions at which it is lodged : the words are, that “ every such appeal shall be then examined, and the matter then finally heard and determined.” But by this practice of adjournment the party who neglects to give the six days notice, will be gaining an advantage which the act intended he should not have.

Mackaness, contra, admitted that no notice of appeal to the first sessions had been given, but contended that the material requisite directed by the act was the recognizance, which had been complied with and entered into. He referred to *The King v. The Justices of Wilts* (a) to shew that although an act giving an appeal to the sessions

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(a) 13 East, 352.

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direct the justices at the said sessions to hear and determine it, yet the justices have an incidental power of adjournment. He referred also to what was said by Buller J. in *The King v. The Justices of Yorkshire (a)*; and relied upon the circumstance of the sessions having respited the appeal.

LORD ELLENBOROUGH C. J. In this case the only question is, whether a notice of appeal was not necessary; for if necessary, it is admitted that none has been given. An appeal is not a matter of common right, but of special provision. Then it may be given either absolutely or conditionally; and if no limits as to time be prescribed, it shall be understood that the appeal must be within a reasonable time. From the reign of Queen *Elizabeth* to that of *George* the First, appeals under the poor laws seem to have gone on without any statutable provision restricting the time of notice; until by the 9 G. 1. (b), reasonable notice was required to be given. But the statute now in question enacts, "that a person may appeal to the sessions next after the expiration of 20 days from the time of conviction, *but* the person so appealing is required to give six days' notice, and to enter into a recognizance." There are therefore two conditions annexed to this right of appeal. One of them, which is the giving notice, has not been complied with in this case. Of course, therefore, the appeal has never been duly entered; and if so, it could not be adjourned; for the sessions cannot acquire to themselves a jurisdiction by an act of their own. The power of adjournment is only incident, when the sessions cannot

(a) 3 T.R. 779.

(b) C. 7. f. 8.

conveniently hear the appeal after it has been duly entered.

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GROSE J. I can give no other sense to the words of the act than that which has been put on them by my Lord, that is, by reading the word *but* as a word of condition.

LE BLANC J. The clause must be read in the same sense as if the words were that such person may appeal *on giving six days' notice*, and entering into a recognizance; and had they been so, they would have been similar to the words of the 13 Geo. 3. (a); upon which the Court have held, that the party not having given notice of appeal as required by that act, had no right to appeal (b). Here the party is required both to give notice, and to enter into a recognizance; and both are included in the same clause, and stand on the same ground. Supposing then the party can delay giving notice, he may delay also entering into a recognizance, and by that means the appeal would never be to the next sessions, whenever it was the interest of the party convicted to delay the appeal. But the intent of the legislature seems to have been to compel an appeal to the sessions, next after the expiration of 20 days from the time of the conviction. It would be nugatory therefore for the Court to order the sessions to enter continuances, where the party had no right to enter the appeal originally.

BAYLEY J. concurred.

Rule discharged.

(a) C. 73. s. 19. 80. (b) R. v. The Justices of Staffordshire, 7 T.R. 81.

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Friday,
May 21st.

HAGEDORN *against* BELL.

Though a state may be in the military possession of one of two belligerents, that will not constitute her subjects enemies to the other belligerent, if the sovereign power of the latter chuses to permit a continuance of commerce with them: therefore where an insurance was effected on property, shipped in this country on account of persons who were domiciled at *Hamburg*, at a time when that country was in the possession of *French* troops, the senate continuing to exercise the powers of civil government in the same manner as before: Held that the assured were entitled to recover for a loss which happened in the course of a voyage permitted by his majesty's orders in council.

THIS action, which was commenced on the 7th of *June* 1811, was assumpsit upon a policy of insurance effected by the plaintiff and subscribed by the defendant for 300*l.*, on the 22d of *August* 1810, upon goods valued at 22,750*l.*, “at and from *London* to any port in the *Baltic*.” The interest was averred in the first count to be in *Brothers Michabolles*, Messrs. *Gouverin* and *Steinman*, and Messrs. *Bianconi* and *Lohman*, and the loss to be by capture. Plea, general issue. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after *Hilary* term 1812, the jury found for the plaintiff, damages 300*l.* and costs 40*s.*, subject to the opinion of the Court upon the following case:

The plaintiff is a merchant resident in this country. The goods insured were shipped by the plaintiff in *August* 1810, on account of and by the order of the persons in whom the interest is averred in the first count of the declaration, and who are all merchants domiciled at *Hamburg*. On the 18th of *August* 1810 a licence was granted, in pursuance of an order of council of the same date, to the plaintiff by the name of *J. P. H. Hagedorn*, of *London*, merchant, on behalf of himself and other *British* merchants or neutral merchants, to permit them to load and export on board the vessel *Emilie*, bearing any flag except the *French*, a specified cargo, from *London* to any port in the *Baltic* not under blockade, &c. notwithstanding the documents may represent the same

to be destined to any other neutral or hostile port, and to whomsoever such property may appear to belong.

In *September* 1810 the ship sailed from *London* with the licence on board, on a voyage to *Swinemunde*, a port in *Prussia*. The ship arrived in *Swinemunde* roads, upon the 9th of *November* 1810. The supercargo went on shore and learnt from the *Prussian* commissary that it would be more safe to land the cargo at *Rugenwalde*, another *Prussian* port. The supercargo went by land to *Rugenwalde*, and the ship in the course of her voyage thither was captured by a *French* privateer, on the 4th *December* 1810, and the goods thereby became wholly lost to the several persons interested therein. Until the year 1811 *Hamburgh* claimed to be a sovereign state. In the month of *November* 1806 *French* troops arrived at *Hamburgh*, but the gates were shut against them, and they were refused admittance into the town; upon which they retired, but soon afterwards returned with such an increase of numbers as the governor of *Hamburgh* could not resist. They then obtained admittance by force, and remained in the town from that period until and at the time of the insurance and loss abovementioned, and from that time to the present have retained the occupation of *Hamburgh* by a military force. However, down to the end of the year 1810 the senate of *Hamburgh* continued in the full exercise of sovereign civil authority, according to its ancient forms, and all the powers of civil government were administered in the same manner as they had always been, previous to the arrival of the *French*. The *British* merchants indeed were arrested on the entrance of the *French* into the town, and remained under

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under a degree of restraint for about six weeks afterwards, but at the expiration of that time all restraint was taken off, and down to the end of the year 1810 the *British* in *Hamburgh* were unmolested, and carried on their trade and correspondence as their occasions required. On or about the 9th of *February* 1811, the senate of *Hamburgh* was deposed by the *French* emperor, and a governor appointed by him was established over *Hamburgh* and the other *Hanse* towns; the arms of the city were then first removed from the senate house, and were no longer used, as they had been till that time to authenticate all public acts. From *November* 1806 up to 1811 all *British* ships and *British* commerce were excluded from the port of *Hamburgh*. *Hamburgh* from this latter time has been subject to the dominion of the *French*.

The case then set forth several orders in council issued by his majesty, respecting the property belonging to the inhabitants of *Hamburgh* and places in the possession of the *French*; which were of the following dates, viz., of the 18th of *February* 1807 (a), 26th *March* 1807 (b), 17th *June* 1807 (c), 11th *November* 1807 (d), 26th *April* 1809 (e), 17th *May* 1809 (f), 22d *June* 1811 (g).

The question for the opinion of the Court is, whether the Plaintiff is entitled to recover. If the Court shall be of opinion that he is entitled, the verdict is to stand; if not, then the verdict is to be set aside and a nonsuit entered.

(a) See printed Orders in Council, p. 28.

(b) Ibid., p. 29.

(c) Ibid., p. 32.

(d) Ibid., p. 52.

(e) Ibid., p. 113.

(f) Ibid., p. 116.

(g) Ibid., p. 132.

Barnewall for the plaintiff; after premising that the same question was depending in the case of *Hagedorn v. Bazett*, argued at Serjeant's-Inn, stated it to be this, viz., whether on the facts found in this case, the subjects of *Hamburg* in *December 1810* were alien enemies. Now that must be determined by a consideration of what constitutes an alien enemy. According to the general understanding of that term, an enemy may be defined to be the subject of another country, with which the king is at war. In order therefore to constitute the subjects of *Hamburg* enemies, it must be shewn that the mere act of the *French* government (a third state) in occupying the town with a military force, placed it in a situation which obliged the sovereign power of this country to consider it as hostile; which is a proposition that can never be supported, as long as it is acknowledged to belong to the sovereign power of every state to determine upon the relations of peace and war with any other state. It is not enough to shew a just cause of war subsisting, unless it has also been treated and acted upon as such; therefore it must appear not only that *Hamburg* was placed by the act of the *French* government in a position capable of being declared hostile by this country, but that she was so declared. And this brings the question to the orders in council, upon which it remains to be seen, what sort of change in her relations towards this country they can be said to have effected. He then went through the several orders stated in the case, and commented upon the effect of each, deducing this conclusion from the whole, viz., that *Hamburg* was a state, the subjects of which were permitted by the sovereign power of this country to continue the relations of commerce with this and other countries; and whose

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property was to be respected, and what had been detained restored to them. He also referred to *Peschell v. Allnutt* in C. P. decided this term, from a MS. note; which was an insurance effected in September 1810, upon freight, on a voyage from *Gluckstadt* to this country. The ship belonged to a *Hamburgher*, and was captured in *October*; and after argument, in which the several orders in council were referred to, the court of common pleas had no doubt that the adventure was protected, *Hamburgh* being by those orders put upon the footing of a neutral.

Carr for the defendant, contended, upon the facts stated independently of the orders in council, that at the time when the insurance was effected, *Hamburgh* neither was, nor had the power of being neutral. The occupation of that state by a military force was not for a temporary purpose, but amounted to a complete conquest; and although it was permitted for a time to retain its ancient form of government, yet, in the end, when the conqueror so willed, it became annexed to France; and received, as in former ages when it was considered a boon to the vanquished, all the privileges of becoming a member of the empire. *Hamburgh* therefore passed under the dominion of another, and no longer formed an independent state from the time of her first occupation (a); and the rights incident to conquest vested in France from that time, however unjust the cause of her occupation might be, and notwithstanding the old form of government was continued. Such at least is the opinion of the writers on the law of nations. In *Vattel* (b) it is said, “ every

(a) *Vattel*. B. I. c. I. §. 11.

(b) B. 3. c. 13. §. 195.

“ acquisition

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“ acquisition obtained by a war in form is valid, inde-
 “ pendently of the justice of the cause, and the reasons
 “ which the conqueror may have for attributing to him-
 “ self the property of what he has taken. Accordingly
 “ among nations conquest has been deemed a lawful title,
 “ and has seldom, if ever, been disputed.” And in a sub-
 sequent section (a), “ The conqueror may rule his
 “ conquest as a separate state, and permit the form of
 “ government to remain.” It is clear that *France* did not
 occupy *Hamburg* as an ally. It was said indeed upon the
 argument at *Serjeant’s Inn*, that *Hamburg* never capitulated;
 but that circumstance shews more strongly the conquest
 to have been complete; for capitulation generally implies
 a surrender upon terms and conditions; whereas without a
 capitulation the surrender must be unconditional. So is the
 language of *Grotius* (b) “ Sicut
 “ autem res, quæ singulorum fuerant, jure belli iis acqui-
 “ runtur qui eos sibi subjiciunt, sic et res universitatis eorum
 “ fiunt qui sibi subjiciunt universitatem, si ipsi velint.
 “ Nam quod de deditis dixit Livius, ubi omnia ei qui armis
 “ plus potest dedita sunt, quæ ex iis habere victor, quibus
 “ mulctari eos velit, ipsius jus atque arbitrium est: idem
 “ in bello solenni victis locum habet. Nam deditio sponte
 “ permittit, quod alioqui vis esset creptura.” And *Livy* (c)
 attributes the same consequences to victory, “ quidquid
 “ Romani tot triumphis partum congestumque possident,
 “ id omne vestrum cum ipsis dominis futurum.” But
 admitting, that *Hamburg*, by retaining her powers of civil
 government might be considered during such period as *sui juris*,
 and competent to maintain the relations of neutrality;
 still she discovered no inclination to preserve those
 relations; for it is stated that British ships and

(a) *Ibid.* f. 201.(b) *Lib.* 3. c. 8. f. 4.(c) *Lib.* 21. c. 43.

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British commerce were expressly excluded from her port. And here, it must be remembered, that it is for the assured, who claims under a licence on behalf of neutral merchants, to make out the neutrality. Now *Vattel* (a) says, "Neutral nations in war are those who take no part in it, remaining common friends to both parties, and not favouring the arms of one to the detriment of the other." Again in *Puffendorf* (b), Mr. *Barbeyrac*, in giving an abstract of the obligations of neutral nations not to favour one belligerent more than another, observes "that they ought not to furnish either of them with things employed in war; and as for those that are of no use in war, if they supply one side with them, they must also the other." So *Bynkershoek* (c) in his chapter, "De statu belli inter non hostes." "Horum (*i. e.* qui simpliciter sunt amici) officium est, omni modo cavere ne se bello interponant, et his quam illis partibus sint vel æquiores vel iniquiores." Lord *Hale* also in treating of the nature of peace, classes under the last head (d), "leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other; which (he says) regularly includes also liberty of mutual commerce and trade." It may be asked then, how consistently with any of these rules the neutrality of *Hamburgh* can be sustained; which, according to some of them, did not amount to the lowest species of amity. After her port became interdicted to the commerce of this country, in compliance with the wishes and policy of *France*, it could no longer be considered as neutral. The case of the *Speculation* (e) so deter-

(a) B. 3. c. 7. f. 103.

(c) *Quest. Juris. publ. lib.* c. 9.(e) 1 *Edw. Adm. Rep.* 184.

(b) B. 8. c. 6. f. 7 n. 2.

(d) 1 *Hale's P. C.* 160.

mined ; although the country, of which the interdicted port forms a part, may not be at war with this country, and may have a general character of neutrality. And lastly, in the case of the *Eliza Ann* (a), Sir *W. Scott* emphatically says, that if a country has shewn more favor to one side than to the other, if it has excluded the ships of one of the belligerents from its ports, and hospitably received those of the other, it cannot be considered as acting with the necessary impartiality, to entitle it to the character of a neutral state." He then concluded his argument with citations from the orders in council, 18th *Feb.*, 26th *March*, 17th *June*, and 11th *Nov.* 1807, from which he inferred, that those orders could never have been issued by the government of this country, except upon an assumption that *Hamburgh* had then forfeited her neutrality.

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Barnewall, in reply, denied that it was incumbent on the plaintiff to maintain the neutral character of *Hamburgh*; the onus being upon the defendant to shew that she was an enemy. But even upon the question of her neutrality, the authorities relied upon for the defendant rather shew that she had forfeited her claim to be treated as neutral, than that the acts of the British government amount to a renunciation of her neutrality. And *Vattel* (b) expressly states, that though the conduct of a neutral nation be not such as it ought to observe, it is sometimes connived at, and often permitted. Indeed the writers who have been quoted, treat rather of the reciprocal rights and duties of neutrals, than in what cases a breach of those duties may be considered as remitted; and therefore *Vattel* adds, "but here we examine what may be done lawfully, and not

(a) 1 *Dodson's Adm. R.* 244.(b) *B. 3. c. 7. §. 104.*

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“ what prudence may dictate according to the conjunctures.” And the other passages cited were directed to the same point. The case of the *Hoop* (a) shews that wherever trade is permitted, it is a suspension of the state of war quoad hoc; and that of the *Santa Anna* (b), that the occupation of any place by the enemy does not necessarily make the inhabitants enemies; indeed that doctrine would go the length of denying to a nation the power of controlling its own relations, which is contrary to first principles (c).

LORD ELLENBOROUGH C. J. The other cases alluded to in the argument, and which stand over for the judgment of the Court, involve other questions: here the only question is, whether the plaintiffs have an insurable interest; and that depends upon whether the persons, in whom the interest is averred, are to be considered as persons engaged in a legitimate commerce, and therefore capable of being protected by this insurance. The state of *Hamburg* is particularly detailed on the facts set forth in this case. It states that notwithstanding the military occupation of *Hamburg* by an overwhelming *French* force, all the powers of civil government were administered in the same manner as they had formerly been before the arrival of the *French*; and I know of no case where a country, maintaining its civil government proprio jure, has been considered as conquered. That *Hamburg* was, at the time when this insurance was effected, under *French* dominion, and had committed acts to warrant this country to consider her as hostile, there can be little doubt; for the flag of the *British* govern-

(a) 1 Rob. Adm. Rep. 199.

(b) 1 Edw. Adm. Rep. 180.

(c) Vattel's Introduction, s. 15. & 16.

ment was at that time excluded, in compliance with the wishes, and in furtherance of the policy of the enemy. But assuming that the exclusion of the flag of any state amounts to an act which would justify hostility between the excluding nation and that whose flag is excluded, still it belongs to every state to pronounce upon the continuance either of amity,* hostility, or neutrality as between itself and any other state. Neutrality, according to the strict definition of it given by the writers upon public law, rather imports the duty which a neutral owes to a belligerent, than the relative situation in which that belligerent chooses to place her. But as it rests with every belligerent to determine, according to its views of expediency, in what way it will deal with neutrals who have acted in violation of their duty; neutrality, therefore, in a more enlarged sense, may signify that permitted relation between any two states, after the right to its continuance has been forfeited by one of them. Nations may be at war with each other by reciprocal acts of hostility done and suffered; but they are not bound to take up every cause of just offence, nor are they of necessity to be considered as hostile to each other, if there be a sort of condonation on the one side, for the purpose of continuing commerce with the other who has given just cause of offence. It will be found also, that writers on the law of nations, in treating of neutrality, have been led rather to examine what a belligerent is warranted in doing, than what it is compelled to do. If, for instance, notwithstanding a just cause of war, a nation should still deem it expedient, considering the convulsed state of the commerce of *Europe*, to continue its connection with any other state, it is at liberty so to do. Now it appears that this country, finding cer-

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tain other countries overpowered by *French* force, still felt desirous of maintaining with them its antient relations of peace and amity; and with that view chose not to enforce against them the rigours of war, but to consider the inhabitants of those countries as persons with whom commerce might still be carried on. The relation, in which they have been placed at different times, has varied according to circumstances. But the actual relation of this country with respect to *Hamburg* is to be taken from the last order in council, subsisting when this adventure was launched. I have already stated that this is not an abstract question, whether *Hamburg* might have been deemed at war with this country, but that the question is, how the government of this country has chosen to treat her acts. Keeping these observations in mind, let us look at the orders of council, with a view of ascertaining in what relation *Hamburg* stood with respect to this country on the 18th of *August* 1810. The first order, bearing date the 18th of *February* 1807, directs “that the ships and goods belonging to the inhabitants of *Hamburg*, which shall be employed in a trade to or from the ports of this kingdom, shall, until further order, be suffered to pass free and unmolested, notwithstanding the said country is or may be in the possession or under the control of *France*, and that all such ships and goods which may have been detained, shall be forthwith liberated and restored.” A principle may be collected from this order; for at the very time when the ships of *Hamburg*, antecedently taken as hostile, were detained by this country, it recognizes her to stand in such a situation, as that her ships should be restored to her. Up to that period, therefore, though she was not strictly neutral, according to the definitions of

of writers on the law of nations ; yet quoad this country, she cannot be considered as hostile, at a time when it directs that her ships shall be restored. The next order is that of the 26th of *March*, which directs “ that all ships and goods belonging to the inhabitants of *Hamburgh*, which have been detained prior to the 1st of *January* last, shall be restored ; and that all ships and goods captured on or after the 1st of *January*, shall be detained (with the exception of ships and goods trading to or from this country) until further order,” &c. Here the order specifies a time, and from that time has certainly more or less of a hostile complexion. It cannot be called a promulgation of absolute hostility, but only of a qualified one. Then comes the order of the 17th of *June*, which further directs “ that the ships and goods of the inhabitants of *Hamburgh*, detained since the 1st of *January*, shall be restored ; and their ships and goods shall not in future be liable to detention, provided they shall be engaged in a trade to or from this kingdom, or between neutral port and neutral port.” Therefore by this it seems, that the commerce of *Hamburgh*, to the above extent, is not only not put an end to as hostile, but is legitimated ; or in other words, within certain limits her character of neutrality is recognized and preserved. Next follows a general order of the 11th of *November*, and if that order had stood, it must be admitted, that we should have been placed in an unqualified state of hostility with regard to *Hamburgh*. It begins by reciting “ that certain unprecedented orders had been issued by the government of *France* against the *British* islands, and that the nations in alliance with *France*, and under her controul, had given effect to them ; and farther, that the order of the 7th of *January* last, (the conciliatory order,

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if I may so call it,) had not answered the desired purpose; it is therefore ordered, that all the ports of *France* and her allies, or of any other country at war with his majesty, or from which, although not at war, the *British* flag is excluded, shall be subject to the same restrictions, as if blockaded, and that all trade in the produce or manufacture of such countries shall be unlawful, and that all vessels trading to or from those countries, and all goods, &c. shall be captured." Here, therefore, the exclusion of the *British* flag is laid hold of as the criterion of hostility, and it is declared that the trading with such places shall be unlawful. His majesty promulgates his will to pronounce those places hostile, under the circumstance of his flag being excluded from them. If then that order had remained unrepealed, there could have been no doubt, that an inhabitant of *Hamburg* could not have insured his property. But now comes the repealing order of the 26th of *April* 1809, which again legitimates the trade with all ports and places, not within the line of strictly hostile demarcation pointed out by that order; and that, notwithstanding the *British* flag is excluded from such ports and places. The order recites, "that his majesty being desirous not to subject those countries which were (i. e. heretofore were) in alliance or amity with him, to any greater inconvenience than was absolutely necessary, did make certain exceptions in the order of the 11th of *November*, and in subsequent orders; and that it was expedient that sundry parts of them should be revoked; it therefore proceeds to direct, (inter alia,) that the order of the 11th of *November* shall be revoked, except as to the trade within certain limits." Let us see then whether *Hamburg* is within the exception, so that the prohibition of her trade is kept alive by this order,

the same as if she was actually blockaded. The exception extends to all ports and places as far North as the river *Ems* inclusively; so that its limits are expressly defined; and the operation of the order as to time is made equally certain, and not left to any implication, for it is to have effect from the day of the date, on any voyage which is rendered legal by this order, although such voyage at its commencement was unlawful and prohibited by the former orders. Now *Hamburg* is not within the *Ems*, which is the outward boundary, and therefore not within the exception; and this was a trade which was before unlawful, and therefore now made lawful by the operation of this order. The drawing a boundary line excludes any inference which might otherwise arise from its being in the possession of a *French* force. There is another order of the 17th *May* 1809, for the more distinctly ascertaining the places within the limits excepted in the last order, and that extends the blockade to the Eastern as well as Western *Ems*. It seems to me therefore that under these circumstances we are to look at what the government of this country has chosen to consider as neutral; and that it must be taken that it chose to consider as such, those countries with whom it has permitted trade. If the order of the 11th of *November* 1807 had stood, *Hamburg* could no longer have been considered as in a state of amity, owing to the effect given in that order to the exclusion of the *British* flag. I am not here pronouncing that the exclusion of the flag of a country amounts on all occasions to an act of hostility. The mere exclusion of trade does not necessarily import an indication of a hostile intention, still less does it hostility itself. We know that there exists in some countries a great jealousy

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of admitting strangers into their ports. *China* affords an instance of this kind, and yet she is not deemed an enemy on that account. Here this country has, by the effect of these orders, placed *Hamburgh* in different relations at different periods. In *November 1807* we find her treated as hostile; afterwards it was thought expedient to alter her relative situation, and to recognize her inhabitants, as persons with whom trade might be carried on; and their ships and goods were released from confiscation and condemnation. From this review of the several orders in council, seeing nothing to render the inhabitants of *Hamburgh* hostile, or persons with whom trade might not lawfully be carried on, it is unnecessary to look to the licence, for under these circumstances no licence was necessary. This case presents this point, and this alone, whether the persons in whom the interest is averred can be protected by this policy, which depends on this, whether the trade was legal. I think for the reasons already given, that they may be protected. We thought it better to dispose of this question by itself, in order to lay a foundation for deciding other cases, and to relieve ourselves from a complication of questions. Upon the whole I am of opinion that the plaintiff is entitled to recover on the interest averred, it not being an interest in any manner hostile.

GROSE J. The ground of objection is, that the parties in whom the interest is averred are in truth enemies. That introduces the question, whether *Hamburgh* stood in a hostile relation to this country. Now looking to the orders in council, and considering them in the light in which they have been put by my Lord, the case

case seems plain. It is impossible not to see by them, that the trade was in some measure made legitimate by this country. This is not a question whether this government might not justly have gone to war with *Hamburg*, but whether it was at war. I cannot say, from a consideration of these orders, that such was her state. The orders breath something pacific, and permit a commerce between *Hamburg* and this country. If that is the case, and the exposition given of them by my Lord be correct, there is an end of the question. It is impossible to say that the government of this country may not consider the inhabitants of another country as neutral with respect to her commerce. The question is whether this country did so consider the inhabitants of *Hamburg*. It seems to me that the construction given to the orders is the correct one, and if so the question is concluded, because the foundation of the argument, namely, that this contract was entered into with a subject of a state at war with this country, altogether fails.

LE BLANC J. In this action, certain merchants resident in this country seek to recover an indemnity, on behalf of other merchants domiciled at *Hamburg*; and the question is whether the contract is valid, in respect of the particular situation in which the *Hamburg* merchants stood. The question comes to this, whether those merchants stand in the situation of persons, whom the policy of the law of this country prevents from entering into a contract of indemnity, or from having such a contract entered into on their behalf. The principle, upon which the policy of the law interferes, is this, that all trading with an enemy tends to strengthen and assist the enemy,

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enemy, and is therefore calculated to defeat the object for which war is entered into ; and consequently no contract to protect the property of the enemy can be permitted. That brings it to the question, whether *Hamburgh* stood in such a situation, as that the law of this country would not permit a contract to be entered into, for the benefit of one of the subjects of that state. The insurance was effected in *August* 1810, and the voyage commenced in *September*. It is material to consider whether such was the state of *Hamburgh* at that time. It is a very different question, whether the relation between two countries is such as to authorize a state of warfare between them ; if that were the question, the authorities cited for the Defendant would be most powerful ; but the question is not that, but whether this country considered the relation of *Hamburgh* to be such, as to make it prejudicial to allow of any contracts for the purpose of indemnifying the inhabitants of that state. Now that question brings us to the orders. They have already been so fully commented on by my Lord, that I shall abstain from going through them. It cannot but be observed however that the order of the 11th of *November*, which is of the most hostile complexion, was much abridged in its operation by the subsequent orders existing prior to this contract ; and therefore whether that order was intended to place *Hamburgh* in a state of hostility, or not, the subsequent orders have done away its effect, and placed the inhabitants upon the footing of persons, whose property the policy of this country allows to be protected. This is entirely independent of any question upon the licence. If I thought it necessary to advert to that, I should construe the language of the licence, in conformity with the orders in council, and according to the relation in which the

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the inhabitants of *Hamburg* stood under those orders; and I should hold the expression “on the behalf of neutral merchants” to apply to those persons, whom this government did not consider as in a state of hostility; and therefore the result would be the same. Therefore on every view of the subject I consider the Plaintiff as entitled to recover.

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BAYLEY J. I am entirely of the same opinion. There certainly was conduct on the part of *Hamburg*, which might have warranted this country in treating her as an enemy; but still this country was not obliged to do so. An overruling power possessed themselves of *Hamburg* against the inclination and interest of its inhabitants; but did not dispossess them of their civil rights, nor of the right of carrying on trade with this country. Nothing will be found in the existing orders of council, declaratory of the intention of the *British* government to place *Hamburg* in a hostile state; on the contrary those orders provide that ships and goods belonging to *Hamburg*, and engaged in trade to or from this kingdom, or between any neutral ports, shall not be liable to detention. Therefore however equivocal her relation might be in some points of view, it is clear that in this respect she was considered by this country as friendly. Whether the order of the 11th of *November* changed the condition of her relations to this country, it is unnecessary to consider; because that order is revoked by a subsequent order.

Judgment for the Plaintiff.

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Friday,
May 21st.

WILSON *against* FODERINGHAM.

The charterer of a ship from *L.* to *B.* and back, cannot plead to an action brought against him by the owner on the charter-party for not providing a sufficient cargo at *B.*, that the ship failed on the voyage from *L.* without convoy, contrary to the 43 G. 3. c. 57., and that the plaintiff was privy to and knew the same: it not being in the contemplation of the parties at the time of entering into the contract to violate the regulations of that act.

COVENANT on a charter-party of affreightment, by the plaintiff as owner of the brig *Diana*, on a voyage from *Liverpool* to *Madeira*, from thence to *Barbadoes*, and from thence to *Dublin* or *Hull*, or back to *Liverpool*; breach, that the defendant did not, nor did the agents of the defendant provide a full and complete cargo of *West-India* produce at *Barbadoes*, but refused so to do; and the cargo shipped at *Barbadoes* by the defendant's agents was deficient of such full and complete cargo by 206 tons, &c. There were several pleas to the declaration, upon which issue was taken. The 4th plea stated that the vessel, before and at the time of setting sail on her voyage from *Liverpool* to *Barbadoes*, and continually from thence until the commencement of the suit, belonged to the plaintiff; and that the plaintiff during all that time was and still is one of his majesty's subjects of this realm; and that the vessel failed on her voyage from *Liverpool* to *Barbadoes* without convoy, &c. contrary to the form of the statute; and that the plaintiff was privy to and knew the same. The plea then negatived the vessel's being within any of the exceptions contained in the act, which dispense with the necessity of sailing with convoy; and concluded, whereby and by force of the statute the said voyage became and was illegal and void, and the plaintiff was not nor is entitled to any freight whatsoever for the said voyage in the charter-party mentioned, or for any part thereof.

Replication, that the vessel had a licence to sail and depart without convoy from *Liverpool*, granted by three of
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the commissioners for executing the office of high admiral, or by some person or persons duly authorized for that purpose.

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Demurrer, assigning for causes, that the supposed licence in the replication mentioned, and the particulars thereof, are not set forth in that plea; and that it doth not appear by the same, whether or not there were any conditions in the supposed licence, nor what those conditions, if any, were, or whether or not such conditions, if any, have been kept and performed; and that it doth not appear by the same plea, by what person or persons duly authorized for that purpose the supposed licence was granted, nor by and under what authority such person or persons so granted the same: and also for that the same is in other respects informal, &c. Joinder in demurrer. There was also another plea stating, as in the former, that the vessel belonged to the plaintiff, and that he was one of his majesty's subjects; it then alleged that a certain licence, before the vessel set sail on her voyage from *Liverpool*, to wit, on the 30th of *April* 1811, was granted for the vessel to sail or depart from the port of *Liverpool* without convoy, on her voyage to *Madeira* and *Barbadoes*, by *J. B.*, *J. S. Y.*, and *F. R.*, then and there being three of the commissioners for executing the office of Lord High Admiral of *Great Britain*, provided she should be armed and manned in a specified manner; and that at the time the said vessel sailed from *Liverpool*, no other licence was or had been granted for the said vessel to sail or depart therefrom without convoy, either by the Lord High Admiral of *Great Britain*, or the commissioners for executing the office of Lord High Admiral for the time being, or any three of them, or by any person or persons duly authorized for that purpose; and that the said vessel sailed

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on the voyage from *Liverpool* to *Barbadoes* without convoy, &c. contrary to the form of the statute, and that the plaintiff was privy to and knew it; and that the vessel at the time of her sailing was not manned in the specified manner, but sailed without convoy manned with a less number than specified, contrary to the form and effect of the licence, and that the plaintiff knew the same. The plea then negatived the exceptions contained in the act, and concluded in the same manner as the former.

To this plea there was a general demurrer. Joinder in demurrer.

Scarlett, for the plaintiff, began by adverting to the convoy act (a), and was about to contend that the act which imposed a penalty on the master for sailing without convoy, did not make it a condition precedent to his acquiring any rights under the charter-party; when the Court interposed, and called on

Holroyd, for the defendant, who insisted that in this form of action, which was not like an action for the freight, grounded upon an adoption by the defendant of the charter-party, it was open to the defendant to avail himself of the objection arising from the sailing without convoy, contrary to the provisions of the statute; and for breach of which the statute made the voyage illegal. The first section enacts, that it shall not be lawful for any ship, &c. to sail from any port or place whatever, unless under convoy; which is an express declaration of the illegality of the voyage, independent of any penalty; and this is confirmed by s. 4., which makes insurances upon all ships sailing without convoy, contrary

to the act, void to all intents and purposes. And for that cause, in *Hinckley v. Walton* (a), the Court of Common Pleas held the voyage illegal; and yet the policy in that case, as the charter-party in this, was made while it was in doubt whether the ship would sail with or without convoy.

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Scarlett, in reply, distinguished *Hinckley v. Walton* from this case, inasmuch as that was the case of an insurance; and besides it was to be inferred from the report, though not expressly so stated, that the assured had previously determined to sail without convoy.

LORD ELLENBOROUGH C. J. If this contract had been made upon an understanding that it was intended to contravene the provisions of the act of parliament, perhaps the voyage might have been illegal, as being an act contemplated to be done in violation of a law of the state; but this contract was entered into, as we must presume until the contrary be shewn, in perfect innocence, and with the purpose of effectually complying with the act of parliament. It may be asked, then, when does the illegality attach? Can it be said that by matter ex post facto it became void ab origine? I consider the case in *Taunton* as decided with reference to an insurance, which is expressly made void by the statute, and is not this case. The question here is, whether a contract by charter-party, there being nothing to shew a previous intention of departing from the directions of the convoy act, is to be vitiated by relation to an act subsequent. I know of no rule of construction of that sort. If it is to be ar-

(a) 3 *Taunt.* 131.

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gued, that because the captain did not comply with the regulations of the act in one instance, therefore he would not fulfil the terms of the charter-party, it would lead to this inconvenience, that in every case we should have to estimate the moral rectitude of the captain. Here the question is, whether the contract is made void by the departure of the captain, without convoy, which subjected him to a penalty. I cannot draw any inference from this breach of the statute, that the contract was meant to be avoided.

BAYLEY J. In *Hinckley v. Walton* there is no doubt that the assured was instrumental, within the words of the act, to the ship's failing as it did. And in a former case of *Cohen v. Hinckley (a)*, it was considered that the policy was not avoided by the ship's failing without convoy, unless the party interested was instrumental to her so failing. I therefore think in this case that the defendant was not excused from completing his loading, because the captain neglected to comply with the provisions of the act.

Per Curiam,

Judgment for the Plaintiff.

(a) 1 Taunt. 249.

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The KING *against* The Inhabitants of the Township
of WARKWORTH.

Saturday,
May 22d.

UPON an appeal against an order of two justices, removing *William Forster*, his wife and children, from the parish of *Alnwick* to the township of *Warkworth*, both in the county of *Northumberland*; the sessions confirmed the order, subject to the opinion of the Court on the following case:

The pauper *W. Forster* was settled in *Warkworth*, but resided for some years in the town of *Alnwick* before he became chargeable, and was removed by the present order; at which time he was a freeman of the town. The town of *Alnwick* is an ancient borough, and the freemen of *Alnwick* are a body corporate by prescription by the name of the chamberlains, common council, and freemen of *Alnwick*. The freedom of the town is acquired by descent or servitude, or is granted upon the recommendation of the common council. The pauper was a freeman by descent, and had been admitted to his freedom twenty-five years before the order of removal. The Duke of *Northumberland* is lord of the manor and borough of *Alnwick*; and the forest of *Haydon*, or *Alnwick*, or *Alnwick* moor, lies within the manor, the soil and royalties being vested in the lord. The pasturage of the moor is of considerable value, and the freemen of *Alnwick* and no others, are entitled to common of pasture thereon, each freeman being entitled, when resident, but not otherwise, to the pasturage of five stints of his own cattle, that is to say, five cows, or twenty-five sheep: the freemen have also a right to dig and cut peats, furzes, turves, and

Where a pauper, as freeman of a town, was entitled, during his residence there, together with the other freemen, to a stinted common of pasture on a neighbouring moor for his own cattle, and also to a right to cut peat for his own use, and get limestones, &c. on the moor, and to put his children to the town school free of expence, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exercised the common of pasture, or had any cattle with which to exercise it: held that these rights did not amount to such an estate as to make him irremovable.

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bushes upon *Alnwick* moor for their own use, and to get limestone, flates, and freestones in the open quarries of that moor: they have the privilege also of setting up their stalls in the market-place, without paying any toll or stallage to the lord, and of having their children educated free of expence at the town school, at which school two of the children named in the order were placed at the time of the removal.

The question for the consideration of the Court is, whether the rights of the pauper, as a freeman of the borough of *Alnwick* amount to an estate from which he is not legally removeable under the statute 13 & 14 Car. 2. c. 12.

Topping and *Hullock*, in support of the order of sessions, contended in the negative. They admitted that a right of common being a privilege arising out of land, had been so far considered as land, as to be holden a tenement; but supposing this privilege amounted to a right of common, they insisted that in order to make the pauper irremoveable from it, it must appear that he was in the actual possession and enjoyment of this right. Now here the pauper had a mere title to exercise a privilege, which it does not appear he ever did exercise, or was even in a capacity to exercise, for it is not stated that he had any cattle; and every freeman will be irremoveable if this pauper be so, for though he has no cattle now, non constat but he may have at a future time. Even in cases which clearly come within the meaning of the party's own freehold, it was for a long time doubted whether, in order to be irremoveable, he must not be resident on the property: and although that has been decided not to be necessary in *Rex v. Houghton Le Spring*

Spring (a), and other cases; still there must be a legal if not an actual occupation. But independently of that objection, it is submitted that such a personal privilege as this has never been held to make the party entitled to it irremoveable: it is a mere personal privilege, continuing only so long as the party is resident, and not transferable, or capable of being demised; so that it does not even amount to a common in gross.

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Richardson and Coltman contra. It is laid down by *Foster J.*, that by magna charta a person is not removeable from his freehold (*b*); and the reason given is, “because none shall be disseised of his freehold.” Now the same reason which applies to land, applies also to every species of tenement of a freehold nature. The present franchise is of that sort, for it amounts to a profit a prendre, or a right of common in gross, which has been held sufficient to confer a settlement (*c*); and the pauper, although not in the actual enjoyment, might at any time have become capable of enjoying it. It is true that he had not any cattle; but he might have had; and it would lead to uncertainty, if it were to be holden necessary that he should be in the actual occupation at the time of removal. Suppose this pauper had had cattle at one time, and had been in the exercise of his right of common, but had disposed of those cattle with an intention of buying others of a more useful description, would he be removeable during the interval? But at all events, taking this to be a simple franchise, it may be said to be as much his own, as any other man’s estate

(*a*) 1 *East*, 247.(*b*) *R. v. Aythrop Rooding*, *Barr. S. C.* 414.(*c*) 7 *T. R.* 671. *Rex v. Derfingham*. 3 *East*, 113. *Rex v. Hollington*.

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is his own: he is entitled to it *proprio jure*, and it appears that he was in part in the exercise of it, by educating his children at the public school; besides which, there was a right of getting flates, which is clearly a right to a portion of the soil.

GROSE J. (a) There is no doubt whatever in this case. When I read it, I was somewhat surprized that the justices should have thought fit to reserve it. The question is whether the pauper, *W. Forster*, was irremovable from his own estate. In order to determine that, we must inquire what estate he had. Now it appears that he had neither land nor house: it is said, however, that he had a right of common; but supposing he had, it does not appear that he was ever in the enjoyment of, or had any cattle wherewith to exercise that right. The profit à prendre, or easement, as it has been called, never existed in him; how then can he be said to have been resident on his own? It cannot be considered as a residence on his own, when in truth he never had it. It would be absurd so to consider it.

LE BLANC J. The question is, whether it appears to us that the pauper was irremovable, during the period of his residence in the town of *Alnwick*, on the ground of being resident on his own estate. The case made in argument to shew that he was residing on his own is this, that he was a freeman of the town, and as such entitled to a right of common on *Alnwick* moor: and this right of common is said to be a tenement. But I think this is not in strictness a right of common, nor

(a) Lord *Ellenborough* C. J. was absent.

can it properly be said to be a tenement; it is a mere franchise. The argument, however, has been carried this length, viz. that supposing it to be only a franchise, still the pauper was irremovable from it. But to this I cannot accede. In the case, for instance, of a freeman of a corporation, who has a right of suffrage for the election of a mayor, or any other of the officers belonging to the corporate body, has it ever been decided that such a franchise made the person entitled to it irremovable? Here the pauper, as a freeman of the town, was entitled, if he had any cattle, to turn them on the moor. This, however, was a mere personal privilege, wholly unalienable, and not falling within the legal definition of a right of common. A privilege of this sort, I believe, has never yet been holden to be such an estate as to make the person entitled to it irremovable. It is a strong circumstance, that notwithstanding the existence of such rights in different parts of the kingdom, no attempt like the present has hitherto been made. It appears to me, therefore, that this does not fall within the purview of those cases which have decided that a party is not removeable from his own; and which doctrine, I admit, has been extended to cases where a party was merely residing in the parish in which his estate was situate, and not upon the estate itself. (a)

BAYLEY J. The case does not find that the pauper had any house in which he was entitled to reside; and as a freeman he had no right of residence; but that must be acquired by other means. When he can ob-

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(a) *Rex v. Sowton*, Burr. S.C. 125. *Rex v. St. Nyott's*, *ibid.* 132.
Rex v. Houghton Le Spring, 1 East 247. *Rex v. Dorstone*, *ibid.* 296.

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tain a residence, then as freeman he is entitled during such residence to turn cattle on the common. But when he removes, he loses this privilege. I am not aware of any case, in which a privilege of this description has been holden to be sufficient to confer a settlement. It is a mere local privilege, and attached to the person so long only as he is resident. From the frequency of these rights, which exist in many corporations in the kingdom, settlements must have been claimed in respect of them, had they been deemed sufficient for that purpose. This case is very different from the cases of removals from landed property.

Order of sessions confirmed.

Saturday,
 May 22d.

LANCASTER *against* FRASER.

Judgment of non pros for not entering the issue cannot be signed unless there be a rule to enter the issue of the same term in which such judgment is signed.

READER shewed cause against a rule for setting aside a judgment of non pros. The rule to enter the issue was in *Michaelmas*-term; issue not entered in time, and thereupon judgment of non pros; which was afterwards set aside on payment of costs. In *Hilary* term nothing was done. In this term, the issue not having been entered, judgment of non pros was signed. The question was whether there must not be a rule to enter the issue of the term in which judgment was signed. It was admitted that with respect to a rule to plead the practice was so (a); and the Court, upon reference to the master, said it was the same in this case.

Comyn in support of the rule.

Rule absolute.

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The KING *against* The Justices of SURREY.*Monday,
May 24th.*

THIS was a rule for a mandamus to the justices of *Surrey*, commanding them to receive an appeal against an order of two justices, removing *George Kellarway* and his family from *Richmond* to *Mortlake*.

The rule was obtained on the affidavit of one of the parish officers of *Mortlake*, which stated that the order of removal was dated on the 11th of *January* last, and was executed in the afternoon of that day. That the quarter sessions for the county of *Surrey* began on the 12th, and that there was not sufficient time to procure any information respecting *Kellarway's* settlement, or the requisite evidence to support an appeal, or even to ascertain whether such appeal ought to be made. That according to the practice of the sessions for that county, notice must be served on the respondent parish by the appellant, of their intention to try such appeal, at least six clear days before the commencement of the sessions; that due notice having been given for the *Easter* sessions, the appeal was then entered; but the Court refused to hear the appeal, on the ground that it ought to have been entered at the *Epiphany* sessions, and respited until the next sessions.

Against the rule an affidavit was made by *C. J. Laruson* Esq., clerk of the peace, which stated that by the course and practice of the quarter sessions for that county, they are always adjourned for a certain time, and appeals against orders of removal are allowed to be lodged at any time during the sitting of the sessions,

Where an order of removal was made and executed on the day before the holding of the *Epiphany* sessions, and the parish to which the pauper was removed, gave due notice and entered their appeal at the *Easter* sessions, at which sessions the justices refused to hear the appeal, on the ground that it should have been entered at the *Epiphany* sessions; this Court granted a mandamus to the justices to receive such appeal, notwithstanding it appeared that the *Epiphany* sessions continued for fourteen days, and were afterwards twice adjourned to distant days, and that it was the practice of the sessions to allow appeals to be entered at any time during their continuance, or at the adjournments, and to respite the hearing to the next sessions.

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or at the adjournment held next after the making such order, without requiring notice to be given to the respondents. And that the consideration of such appeal is thereupon adjourned to the next quarter sessions after those at which it is so lodged. That the last *Epiphany* quarter sessions commenced on the 12th of *January*, and lasted fourteen days, when they were adjourned to the 2d of *February* following, (which adjournment lasted one day,) and again adjourned to the 1st of *March*, which lasted two days. It was stated also that *Newington*, where the *Epiphany* sessions were holden, was distant only eight miles from *Mortlake*.

Park and *Larves* upon shewing cause, admitted that according to the construction of the stat. 13 & 14 *Car. 2. c. 12. §. 2.*, which gives the appeal, the next quarter sessions must be taken to mean the next possible sessions (*a*); but they contended that the *Epiphany* sessions were the next possible sessions, for it appears that by the practice of the sessions the appeal might have been lodged at any time during their continuance, which was fourteen days, or afterwards, at either of the adjournments; and no notice is necessary before entering the appeal, although by the 9 *G. 1. c. 7. §. 8.*, notice must be given before the hearing. And this being a parish within the county, must be presumed cognizant of the practice; and being also in the vicinity of where the sessions were holden, it falls within the rule in *Rex v. The Justices of Herefordshire* (*b*), where, although the parish was more distant from the sessions than in this case, and the prac-

(*a*) *R. v. Justices of Yorkshire*, *Dougl.* 192., 4th edit.

(*b*) 3 *T. R.*, 504.

tice was not to receive appeals after the first day, this Court refused a similar application to the present.

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Nolan, in support of the rule, relied on *Rex v. The Justices of London*. (a)

LORD ELLENBOROUGH C. J. 'The statute does not contemplate the continuance of the sessions. It enacts that the party may appeal "to the next quarter sessions," without adding "or some adjournment thereof." It takes the holding of the sessions as the point of time, to which it refers the appeal; and the sessions are always considered in law as one day, to whatever period they may by accidental causes be extended. The appellant parish ought to have a reasonable time allowed for considering whether they will appeal or not. The question is, whether the interval between the 11th and 12th of *January* was a reasonable time for that purpose. We are of opinion that it was not.

BAYLEY J. referred to *Rex v. Justices of Flintshire*. (b)

Per Curiam,

Rule absolute. (c)

(a) 15 *East*, 632.

(b) 7 *T.R.*, 200.

(c) See *R. v. Justices of Dorset*, 15 *East*, 200., and *R. v. Justices of Suffolk*, *ib.* 206.

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Monday,
May 24th.

LEE *against* BIRRELL.

The 23 G. 3. c. 90. s. 4., for paving and lighting the parish of *St. Martin*, which prohibits under a penalty any person during the time he shall be collector of any tax, or hold any office of profit, or be interested in any contract or work to be done in the execution of that act, from acting as a committee-man under the act, does not extend to a collector of the assessed taxes.

DEBT for penalties. The declaration stated that the Defendant, after the making of a certain act of parliament, passed in the 23d year of his present majesty, intituled, “ An act for better paving, cleansing, and lighting the parish of *St. Martin in the Fields*,” &c. (a), on the 29th of *September* 1812, at the parish of *St. Martin*, in the county of *Middlesex*, did act as a committee-man in the execution of the said act, he, the Defendant, then and there being *collector of a certain tax commonly called the assessed taxes for a certain part of the said parish*, that is to say, *Suffolk-Street* ward, contrary to the form of the said act. Whereby and by force of the said act the defendant then and there forfeited 100*l.*, &c. The second count was for a like penalty, charging that the Defendant did act as a committee-man, &c. he the Defendant then and there being *collector of a certain tax called the property-tax for the said part of the parish*, contrary to the said act. There were other counts. Plea, nil debet.

At the trial before Lord *Ellenborough* C.J., at the *Middlesex* sittings after last term, it was proved that the

(a) By 23 G. 3. c. 90. s. 4. it is enacted, that no person shall be capable of acting as a committee-man in the execution of the said act, unless he shall be then resident, &c., nor during such time as he shall be collector of any tax, or shall hold any office of profit, or be any way interested or concerned in any contract or work to be done in and about the execution of any of the powers of the said act. And in case any such person hereby made incapable of acting as a committee-man in the execution of this act, shall nevertheless presume to act as such, every such person shall for every such offence forfeit and pay the sum of 100*l.*, &c.

defendant

defendant acted as a committee-man in the execution of the said act, and was at that time a collector of the assessed taxes for *Suffolk-street* ward, as alleged in the declaration, whereupon his Lordship allowed the plaintiff to take a verdict on the first count, with leave to the defendant to move to enter a nonsuit.

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Richardson accordingly on a former day in this term obtained a rule nisi for entering a nonsuit, or arresting the judgment, on the ground that the prohibition contained in stat. 23 G. 3. c. 90. s. 4. must be restrained to persons that should be collectors of any tax, or should hold any office of profit, &c. connected with the said act, and did not extend to collectors of the public revenue.

Abbott (with *Holroyd*) shewed cause, and relied on the generality of the words "collector of any tax," which might have been controlled, if so intended, by words restrictive of their meaning to that act; in the same manner as in a subsequent part of the clause the prohibition was expressly confined "to persons interested in any contract or work to be done in and about the execution of the act."

But the Court were clearly of opinion that the latter words over-rode the whole clause; and controlled the general meaning of the words "collector of any tax," or who "shall hold any office of profit;" otherwise a different construction would go to disqualify a person who held an office, however exalted, in fee or in tail, from executing the powers of this act; which would be pushing the construction beyond all reasonable limits.

Then

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Then if the words cannot reasonably be understood in their generality, as including every office of whatever nature, they must be construed as of an office connected with this act.

Rule absolute.

Tuesday,
May 25th.

SHIPLEY and Others *against* KYMER and Others.

Where sugars were shipped from abroad under a bill of lading, which expressed that they were on account of the plaintiffs, and were to be delivered to *W.* and their assigns, and *W.* who were the agents of the plaintiffs for the management of their property consigned from abroad, indorsed the bill of lading, together with the other bills of lading comprising the rest of the cargo, to the defendants, and drew bills upon them for the amount of the whole cargo, which the defendants accepted and paid, and sold the sugars at two months credit, at the expiration of which they carried the amount of the proceeds to the account of *W.*, who in the interval between the sale and the expiration of the credit had become bankrupts: Held that the plaintiffs were entitled to recover the proceeds of such sale from the defendants.

ASSUMPSIT for money had and received. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Michaelmas* term a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case :

The plaintiffs are proprietors of estates in the island of *Nevis* in the *West Indies* : the defendants are brokers in partnership resident in *London*. Messrs. *Williams* and *Wilson*, who were merchants at *Liverpool*, were employed by the plaintiffs as their agents in *England*, for the management of the property consigned from their estates in *Nevis*; and were in the habit of employing the defendants as brokers, for the sale of cargoes of goods coming to the port of *London*, consigned to them (*Williams* and *Wilson*), and of drawing bills upon the defendants on account of such cargoes ; and there was an open account between them. In *July* 1810 seventy hogsheds of sugar marked *F. S.* the property of the plaintiffs, were shipped at the island of *Nevis* on board the ship *Augusta*, under a bill of lading, specifying that the seventy hogsheds were on account and risque of the heirs of *Lady F. Stapleton*

deceased, and were to be delivered to Messrs. *Williams* and *Wilson* or to their assigns. The bill of lading was in the common printed form, and the words “on account and risque of the heirs of Lady *F. Stapleton* deceased,” were inserted in writing. The plaintiffs are the persons described as “the heirs of Lady *F. Stapleton* deceased.” In the beginning of *September* 1810, *Williams* and *Wilson*, who were consignees also of the whole cargo of the *Augusta*, indorsed and delivered to the defendants the above-mentioned bill of lading, which they had received from the plaintiffs, together with all the other bills of lading of that ship; and at the same time drew bills upon the defendants against the cargo, including the sugars mentioned in the bill of lading, to the amount of 15,000*l.*, at four months; which were accepted and paid by the defendants. Upon the arrival of the ship, the defendants on the 4th of *September* entered the cargo at the custom-house, and proceeded to land and sell it, according to the usual course of business between them and *Williams* and *Wilson*. The sugars were sold at the usual credit of two months in various parcels, between the 25th of *September* and the 9th of *October*, both inclusive, and were paid for in due course. *Williams* and *Wilson* stopped payment on the 17th of *September*, and never again resumed their payments; and their stoppage was known to the defendants shortly after it took place, and before they had sold any part of the sugars; but long after they, as brokers to *Williams* and *Wilson* for the sale of the said sugars, had accepted bills to the amount above mentioned. On the 17th of *November*, *Williams* and *Wilson* committed an act of bankruptcy, and on the 30th a joint commission was issued against them and one *Harrison*, and on the 14th of *December* another commission against them only.

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The first commission was afterwards superseded by order of the Lord Chancellor, but the second is still in prosecution. The defendants on the 10th of *December* carried to the credit of *Williams* and *Wilson's* account in their books the sum of 2066*l.* 15*s.* 1*d.* as the amount of the sales of the 70 hogsheads of sugars, the two months credit on the several parcels having expired at that time, and the whole amount being then due. On the 19th of *December* the accounts were tendered, bearing date on that day. *Williams* and *Wilson* are indebted both, to the plaintiffs and to the defendants to a greater amount than the sum sought to be recovered in this action. In *May* 1811 a demand was made by the agents of the plaintiffs upon the defendants for the proceeds of the 70 hogsheads of sugar in question. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. If the Court should be of that opinion, the amount of the damages to be ascertained by a reference; otherwise a nonsuit to be entered.

Bosanquet for the plaintiffs observed on the facts, that as the bill of lading expressly specified that the sugars were consigned to *Williams* and *Wilson* on account of the plaintiffs, there could be no doubt that the defendants when they took the bill of lading and made advances upon the sugars, did it with full notice that *Williams* and *Wilson* were only factors. They afterwards sold the sugars with a knowledge of *Williams* and *Wilson's* insolvency, and received payment for them after their bankruptcy; and the question is, whether under these circumstances they are entitled to withhold the proceeds of such sale, which the plaintiffs, adopting the act of sale, seek to recover from them in this form of action. The defend-

ants

ants can only be entitled to withhold the proceeds either as having a lien on them for their advances to *Williams* and *Wilson*, or as having a set-off against them, or as being discharged by payment. As to the first, if they had not a lien on the goods, neither can they have on the proceeds; for the one is consequent upon the other; and in *Martini v. Coles* (a) it was decided that a factor by pledging the goods of his principal cannot convey a lien to the pawnee for his advances. Then as to the set-off, that can only exist in cases of mutual credit or debts (b); whereas this sale by the defendants did not constitute any debt between themselves and *Williams* and *Wilson*; being made with full notice, which the bill of lading conveyed to them, that *Williams* and *Wilson* were only factors. The sale therefore properly constitutes a debt between them and the plaintiffs, who were the principals. In *Maanfs v. Henderson* (c) it was held that where an agent at the time when he effected an insurance told the broker that the ship was neutral, it was a sufficient indication that he was acting as agent, and not on his own account, although he opened the policy in his own name; and therefore the broker had no right to retain the policy against the principal for his general balance against the agent. Then if this cannot be a subject of set-off between the parties, neither can it operate as payment to *Williams* and *Wilson* in discharge of the plaintiffs' claim. Payment to an agent may be good as a discharge against the principal in those instances where it may fairly be presumed that the agent is authorized to receive it; but it cannot be supposed in the present case that the plaintiffs would authorize such a payment as this, which is no actual payment, but

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(a) 1 M. & S. 140.

(b) 5 G. 2. c. 30. f. 28.

(c) 1 East, 335.

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merely striking off so much as the proceeds amount to, from the credit side of the account current between the defendants and *Williams* and *Wilson*.

Puller, for the defendants, rested their case on the ground of payment. He contended that this case differed from all the former, inasmuch as it is found that *Williams* and *Wilson* were employed by the plaintiffs as their agents, in the management of the property consigned to them from *Nevis*. They were therefore something more than mere agents for sale, having a general control over the property to dispose of it in the manner they might think best. It is said that *Williams* and *Wilson* could not pledge; but surely they might sell and receive the value; and the case states, that when they indorsed the bill of lading to the defendants, they received the value in acceptances: which is equivalent to payment (a). It was therefore a delivery of the sugars to the defendants upon payment made by them instant, or rather by anticipation before the sugars were delivered; which is in effect a complete sale. As to the subsequent bankruptcy of *Williams* and *Wilson*, that cannot alter the rights of the defendants after payment made by them, if *Williams* and *Wilson* had a right to sell and receive payment. The case of *Wright v. Campbell* (b) comes the nearest to the present, and that was considered as a case of sale and not as a pledge. In *Maanfs v. Henderson* it was only decided that the policy-broker who dealt with the agent, had no lien upon the policy as against the principal, for a general balance due from the agent; but the Court allowed the lien to the extent of the premium on

(a) *Lickbarrow v. Mason*, 6 East, 25. in note, per Buller J.

(b) 4 Burr. 2046.

the policy; and therefore that case, if at all in point, is certainly not unfavourable to the argument, that where payment has been made upon a specific thing to a party entitled to receive it, to that extent the party making the payment will be protected. Now this was a payment by means of acceptances given to the party who had a right to receive them in exchange for the sugars, and it was made, as appears from the case, according to the usual course of business. If it had been made in specie, can it be doubted that it would have been good? And being by acceptances makes no difference. In *Pickering v. Busk* (a) the Court held a sale by the agent would bind the principal, where it was done in the usual course, and the agent was in a condition to sell; and *Moore v. Clementson* (b) is not an authority to the contrary, because there the seller was known to be a mere factor. Here the single circumstance of the consignment being made to *Williams* and *Wilson* on account of the plaintiffs, did not indicate to the defendants that they were only factors in this instance, so as to take it out of the usual course of their dealing. At all events, the plaintiffs should have made their demand before the *May* following, in order to give the defendants the earliest opportunity of resorting to the funds of *Williams* and *Wilson*.

LORD ELLENBOROUGH C. J. This is a very clear case. It is an action by the proprietors of certain hogsheds of sugar consigned from *Nevis* to *Williams* and *Wilson* their factors, under a bill of lading directed to them or their assigns. The first question is, whether the bill of lading notifies to whom the property belongs. Now that ques-

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(a) 15 *East*, 38.(b) 2 *Camp. N. P. C.* 22.

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tion is answered by the fact, for the bill of lading specifically states that the goods were shipped on account and risque of the heirs of Lady *F. Stapleton*, whose heirs the plaintiffs are. I think therefore there can be no doubt that that sufficiently designates the property. These sugars, together with the rest of the cargo of the ship mentioned in the case, were shipped to *Williams* and *Wilson*, or their assigns, who were therefore entitled under this consignment to take possession of the whole for the benefit of the individual proprietors. In this situation *Williams* and *Wilson* indorse and put into the hands of the defendants the whole of the bills of lading, and instead of taking advances by acceptances, on account of this particular portion of the cargo, to the amount of about 2000*l.*, they take advances to the amount of 15,000*l.*, on what I call a pledge of the whole cargo. It was an advance not on a calculation of the value of these specific sugars, but on a calculation of the gross amount of the whole. It was an advance too upon pledge, and cannot be considered as a payment by anticipation upon a sale outright, as it has been argued; unless it can be shown that the defendants stood in the situation of purchasers, which they never did. It certainly was contrary to the duty of *Williams* and *Wilson* as factors, to complicate the property of the heirs of Lady *Stapleton* with that of the other proprietors in one general advance taken upon the whole cargo. That it cannot be considered as a purchase is clear, because there was no person to look to ultimately for payment for these specific sugars, at the time when the advances were made, which there must be where there is a purchaser; but the defendants, according to their usual course of business, were to dispose of them and to account with *Williams* and *Wilson* for the proceeds: they were not the buyers,

but

but the persons to obtain a buyer. It seems to me therefore that this was an unauthorized transaction of pledge by the factors, and consequently not binding on the plaintiffs. Then if the defendants have no right under the pledge, have they any other rights? They were aware of *Williams* and *Wilson's* insolvency, before they commenced the sale of any part of the sugars. That, it may be said, would not of itself alter the rights of the parties, but still it operated as notice. But an act of bankruptcy afterwards takes place, by which the authority of the agent is revoked. A factor, though he may not be prevented from selling by the stoppage of his employers, yet when an act of bankruptcy intervenes, is bound to hold the proceeds of the sale for the proprietors of the goods; for if the property be only a trust in the hands of his employers, it will revert to the original proprietors. These plaintiffs therefore stand in the situation of parties who bring their action for the proceeds of property misapplied by the agent after his agency is at an end. It seems to me that the original property in the sugars still remained in them, and that *Williams* and *Wilson* could not, by this mode of dealing, convey it to the defendants, nor any lien in respect of it. The plaintiffs therefore are entitled to the proceeds which they claim, deducting the expences of sale.

GROSE J. This has been treated in argument as a case of sale by *Williams* and *Wilson*, to the defendants; and it has been insisted that the defendants having paid for the sugars have therefore a right to retain them. But looking at the transaction and the situation of the parties, I think there is nothing less like a sale than this.

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The goods were consigned from *Nevis* to *Williams* and *Wilson*, as factors, to be sold to others; but they were not so sold: on the contrary, they were put into the hands of the defendants, who advanced money upon them, but not as buyers, and after having sold them, now seek to retain the proceeds from the principals when the agents have become bankrupt.

LE BLANC J. The character of the different parties is distinctly stated on the case. The plaintiffs were the owners of a *West India* estate; *Williams* and *Wilson* were employed by them as agents in the management of the property consigned to them from such estate, and the defendants were brokers employed by *Williams* and *Wilson*. The question is, whether or not, this being a consignment of property to *Williams* and *Wilson*, or their assigns, specifically on account of the plaintiffs, the defendants, who received it from *Williams* and *Wilson*, under an indorsement of the bill of lading for the purposes of sale, can protect themselves from payment over to the plaintiffs of the proceeds, by having given their acceptances on account of this property, together with the rest of the cargo. It has been contended, on the only ground which could be taken, that this amounted to a sale at the time when *Williams* and *Wilson* put the property into the hands of the defendants to sell for them. Now let us see if it can be so considered. The case states that *Williams* and *Wilson* were in the habit of employing the defendants, and placing cargoes in their hands for sale, and of drawing bills upon them on account of such cargoes. This therefore was a habit of dealing not by way of sale to them of such cargoes; but by drawing in advance upon them as
upon

upon a pledge. It was placing goods in their hands and drawing upon them on account, not in the character of principals receiving payment for the goods, but in that of brokers employing others to make sale for them, and receiving a gross sum in advance, to be afterwards adjusted when the proceeds were finally accounted for. If then the plaintiffs afterwards interpose as principals, and call on the defendants as brokers before they have accounted with *Williams* and *Wilson*, they have a right so to do and recover the money. In *Pickering v. Busk* the Court came to the conclusion that it was a transaction of sale authorized by the principal, and so expressed themselves, without meaning to shake the grounds upon which it is held that a factor cannot pledge. It is immaterial to consider, whether the facts of that case warranted the conclusion that the factor had authority to sell; the principle upon which it was decided was, that it was a sale and not a pledge. But it is perfectly clear that there is nothing like a sale in this case, but a mere pledge; and therefore the plaintiffs are entitled to recover.

BAYLEY J. I am of the same opinion. A factor has no authority to pledge, because it is out of the usual and ordinary course of his dealing, but he may sell. The question then is whether this be a sale or pledge. The case states that these sugars were consigned with a variety of other goods to *Williams* and *Wilson*, which other goods, as it has been suggested in the argument, were indorsed to them by the bills of lading as mortgagees, and if so, as to that part they may be considered as proprietors; but with respect to these sugars they do not stand in the character of proprietors.

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The defendants had notice of this by the terms of the bill of lading; and do not give their acceptances upon an estimate of the value of this particular part of the cargo but of the whole. After the notice they had, the prudent course would have been not to have given their acceptances, payable to *Williams* and *Wilson*, but to the heirs of *Lady Stapleton*. It is said that they did nothing more than they were in the habit of doing; but it does not appear, whatever that habit might have been, that the plaintiffs were aware of it, or ever sanctioned such a course of dealing. Then it is said, that no demand was made by the plaintiffs until *May*; but non constat that they knew of the transaction before that time, and if the defendants were wrong in the first instance, this delay of the plaintiffs in advancing their claims, will not vary the rights of the parties.

Postea to the plaintiffs.

Tuesday,
May 25th.

CUMMING *against* FORESTER and Others.

Where a broker effected policies of assurance in the name of his principal under a *del credere* commission: Held that he could not set off losses which happened on those policies in an action by the underwriter to recover premiums, although the losses claimed were total, and the broker had accounted for them with his principal.

IN *indebitatus assumpsit* for premiums of assurance, to which the defendants pleaded the general issue, with a notice of set-off, and by their bill of particulars claimed several sums as due to them for losses upon several ships, (which were total losses), the cause was referred to arbitrators; who being in doubt whether the defendants were entitled by law to their set-off, stated the material facts on their award, to the following tenor, in order to enable the parties to take the opinion of this

Court :

Court: "We do find and declare that the plaintiff, *Robert Cumming*, being an underwriter, underwrote in account with the defendants, as brokers, divers policies of insurance, and amongst others, certain policies filled up in the name of *James Hill*, the assured, by whom the defendants were employed: that the defendants at the time of effecting the said policies for *Hill*, guaranteed the solvency of the plaintiff and other underwriters on the said policies to *Hill*, and sent the policies to him with their guarantee indorsed thereon, and charged and were allowed by him a del credere commission upon them; but there was no proof before us that the plaintiff was acquainted with the fact of such guarantee until the losses on the said policies hereinafter mentioned were claimed. We farther find that losses upon the said policies effected for *Hill* happened, for which the plaintiff was liable as an underwriter on the same; which policies were then returned into the hands of the defendants to get adjusted by the underwriters, and the said losses in respect of the subscriptions of the plaintiff on the said policies were settled, allowed, and paid in account by the defendants with and to *Hill* under and by virtue of their said guarantee, before the said action was brought; the plaintiff having previously stopped payment, and withdrawn himself from business on account of the deranged state of his affairs; and we further find, that at the time of the commencement of the said action a balance of premiums of insurance was due and payable from the defendants to the plaintiff, amounting to the sum of 728*l.* 18*s.* 1*d.*; we find that the said losses settled and paid by the defendants to *Hill*, under their guarantee to *Hill*, exceeded the said sum of 728*l.* 18*s.* 1*d.*; but we award and declare upon

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the facts aforesaid, that the defendants are not entitled to set off the said losses against the said balance or sum of 728*l.* 18*s.* 1*d.*; and we therefore award, order, adjudge, and determine that the defendants do and shall, on the 6th of *January* now next ensuing, pay to the plaintiff the said sum of 728*l.* 18*s.* 1*d.*” The defendants having refused to pay this money, a rule nisi was obtained for an attachment, and the case coming on to be heard at the end of the last term, the Court directed the matters to be stated in the form of a special case; and the question under the above circumstances, now stated for the opinion of the Court was, whether the amount of the losses mentioned in the award could be legally set off in this action against the plaintiff’s demand. If the Court shall be of opinion that the amount of such losses can be set off, the rule for the attachment is to be discharged, otherwise to be made absolute without costs.

Abbott, for the plaintiff, contended that these losses could not be set off; 1st, because they were unliquidated damages; 2dly, because a broker cannot set off losses on policies effected for his principal, although the broker may have acted under a commission del credere. 1st. Being unliquidated damages, they are not within the statute of set-off (*a*), which applies only to debts, or such demands, upon which, before the statute, the defendant on action brought, might have paid money into court, but that could not have been done in the present instance, until 19 *Geo. 2. c. 37.* The cases of *Grove v. Dubois* (*b*), and *Bize v. Dickason* (*c*) do not apply;

(*a*) 2 *G. 2. c. 22. s. 13.*

(*b*) 1 *T. R. 112.*

(*c*) 1 *T. R. 285.*

for those cases turned on a different statute (a), which extends to mutual credit as well as mutual debts, and therefore has received a more enlarged construction. Here, if as in *Wienholt v. Roberts* (b), the party had acknowledged losses to a specific amount, it might have been argued that that amounted to an adjustment, and the demand became liquidated, and in the nature of an account stated, and then perhaps a set-off might be allowed; but without any adjustment, the losses remained unliquidated until ascertained by recovery in an action for damages; and the arbitrators in this case had no power to ascertain them, because the cause only, and not all matters in difference, was referred to them. 2dly, Supposing these losses capable in their nature of being set off, still the defendants, as brokers, are not entitled to set them off. A del credere commission, whatever difference it may make between the broker and his employers does not operate as between the broker and a third person, to place the broker in the situation of principal, especially in a case where he does not assume to act as principal. Now here the policies were all effected in the name of the principal, so as to give the defendants not even a prima facie right to maintain an action in their own name, and to afford the plaintiff no notice that any other person than the principal was interested in them. And this is another circumstance of distinction from *Grove v. Dubois*; for there the policy was filled up in the name of the broker, and the principals were unknown to the underwriter, so that the whole dealing was between the broker and the underwriter. In that respect therefore the case

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(a) 5 G. 2. c. 30. s. 28. *

(b) 2 Camp. N.P.C. 586.

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was analagous to that of a factor, who, until his principal be disclosed, may sue in his own name.

Campbell, contra, urged the propriety of allowing the set-off in this case, as well to avoid circuitry of action, as because these being total losses, were in the nature of liquidated damages; and as to there being no adjustment in this case as there was in *Wienholt v. Roberts*, the same might be said of *Grove v. Dubois*, and *Bize v. Dickason*. It is true that in *Grove v. Dubois* Buller J. said that the notice of set-off was bad, but that was because the losses were not paid over by the defendant to his principals before the bankruptcy of the underwriter. Both those decisions however turned upon the effect of a commission del credere, and therefore are in point, and govern the present. If the defendants might have a cross-action against the plaintiff for the amount of these losses, why may they not set them off? And it seems clear that they might maintain such action, inasmuch as they have been obliged, through the default of the plaintiff, to make good those payments which he was bound to make; it was therefore a compulsory payment on the part of the defendants, and released the plaintiff from all farther demand of the assured, *Godsal v. Boldero* (a); and therefore the law will imply a promise by the plaintiff to repay them, *Exall v. Partridge* (b), *Jenkins v. Tucker* (c); and in *Child v. Morley* (d), Lord Kenyon said that if the broker had been bound as guarantee, there could have been no doubt he might have maintained the action.

LORD ELLENBOROUGH C. J. This is an action by an underwriter to recover against his brokers certain pre-

(a) 9 East, 81.

(b) 8 T.R. 308.

(c) 1 H.Bl. 90.

(d) 8 T.R. 614.

miums not paid over. In the usual course of things the underwriter acknowledges upon the face of the policy the receipt of the premium, which is an admission that he has received it through the intervention of the broker, and has no claim against the assured. His claim therefore against the broker is perfect, unless it be met by the broker with a claim of set off. Here the claim of the brokers to set off arises out of an unauthorized contract made by them with their employers, without the privity of the plaintiff. But I cannot help thinking the doctrine resorted to in the argument as to the right and liability consequent upon a guarantee goes too far. I cannot conceive how a contract between *A.* and *B.* can vary the rights between *B.* and a third person who is a stranger to it, and empower *B.* to set up a claim against him as derived out of that contract. Perhaps something may be found in the decisions which would carry this liability to a greater extent than I think is warranted. But independently of that question, suppose the assured in this case had been sued for premiums, could he set off unliquidated losses, and what more do these defendants claim to set off? But the statutes of set-off apply only to mutual debts, and are therefore not like the statute of bankrupt, which embraces mutual credit, and upon which the case of *Grove v. Dubois* turned; and it is sufficient to say that mutual credit ex vi termini imports unliquidated damages, and when they can be so arranged the account may be taken between the parties. Therefore in that respect the case of *Grove v. Dubois* does not apply; and besides, there the dealing was with the defendant as a principal. As to compulsion of law, it was a compulsion of the defendants' own seeking, which arose out of their own

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voluntary act, and the case is not like *Exall v. Partridge*, where the money was paid by the party under compulsion of law to redeem his property from a distress not of his own creation. But no person can, by payment under a voluntary contract acquire a right against a stranger which he had not before; the distinction is if it be by compulsion. In this case there is no pretence for a set off, for the assured originally could not have claimed to set off these losses, and no bankruptcy has intervened to bring this case within *Grove v. Dubois*.

Per Curiam,

Rule absolute.

*Tuesday,
May 25th.*

THISTLEWOOD *against* CRACROFT and DARLEY.

Money fairly
lost at play
cannot be reco-
vered back in
an action of
debt for money
had and re-
ceived not
founded on the
statute.

DEBT for money had and received. *Cracroft* suffered judgment by default. *Darley* pleaded nil debet. At the trial before Lord *Ellenborough* C. J. at the last *London* sittings, it appeared from the defendants' answer to a bill filed against them in the Court of Chancery, which was read by the plaintiff, that the money sought to be recovered in this action had been lost by the plaintiff at play, at a gaming-house in *St. James's-street*. The plaintiff, who was a stranger to the defendants, had gone to this house at an early hour in the morning, and proposed to play with *Cracroft* at hazard for a larger sum than he chose to play for, whereupon *Darley*, with whom *C.* had no previous communication, and whom he only knew by name, proposed to *C.* that each of them (*C.* and *D.*) should put down 50*l.*, and so form a bank to meet the losses that might ensue from playing for such high stakes, and that the profits and losses should be borne and di-

vided

vided equally between them. After playing for some time they desisted, when it was found upon reckoning up the money in the bank, which had never been removed from the table, or out of sight during the time of playing, that the defendants had jointly won from the plaintiff 841*l.*, which they divided between themselves according to the agreement, after making a deduction of 126*l.* for money lost by them to two persons in bets relating to chances in the course of the play, and another of 7*l.* for the waiters. The plaintiff threw the dice himself during the whole time; and the money was won fairly in the course of play. The declaration not concluding according to the form of the statute (a), the plaintiff was precluded from claiming to recover as for money lost at play, but insisted upon his right to recover as for money paid on a void or illegal consideration; to which it was answered for the defendant, that it appearing that both parties were in *pari delicto*, the rule *potior est conditio possidentis* applied. His Lordship inclined to this opinion, but directed the jury to find for the plaintiff for 708*l.*, reserving liberty for the defendant to move on this point. Accordingly *Staveley* having on a former day in this term obtained a rule *nisi* for setting aside the verdict and entering a verdict for the defendant *Darley*,

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Park and *Comyn* now shewed cause, and compared this to the cases of *Jaques v. Golightly* (b), *Browning v. Morris* (c), and *Jaques v. Withy* (d), where two parties having been engaged together in lottery insurances, the

(a) 9 *Ann. c.14. s. 2.*
 (c) *Cowp.* 790.

(b) 2 *Bl. Rep.* 1073.
 (d) 1 *H. Bl.* 65.

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Court permitted the one who had paid his money for such insurances to recover it back from the other who received it; and yet the transaction being illegal, both might in some measure be considered as in *pari delicto*. So here both have been concerned in a matter prohibited by law; but the question is whether the defendant be not the greater delinquent. Notwithstanding it is stated that the money was won fairly, the natural conclusion from all the facts is, that the defendants were leagued together to strip the plaintiff of his money, which they agreed to share; and therefore he is the party imposed upon by the other, and not strictly in *pari delicto*. Upon this distinction the action in *Williams v. Hedly (a)* was held maintainable.

The Attorney-General and *Stavley* contra were stopped by the Court.

LORD ELLENBOROUGH C. J. If the Court discovered any traces of foul play in this case, so as to form a shade of delinquency between these parties by making it a case of oppression or fraud upon one, they would eagerly have interfered in order to administer relief. But if all has been fair between them, then both parties are equally delinquent. In the cases which have been mentioned of the lottery insurances, the statute was considered as intended to protect the individual, and to mark the lottery-office keeper as stigmaticus, the one being likely to be oppressed or imposed upon by the other; and on that view of the statute those decisions turned. In this case there is nothing to point out any disparity of delinquency between the parties.

(a) 3 East, 378.

LE BLANC J. (a) The transaction no doubt was illegal, but there seems to be no imputation of foul play to entitle the plaintiff to ask for relief.

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CRACROFT.

Per Curiam,

Rule absolute.

(a) Grose J. had left the court.

THE KING *against* The Governor and Company
of the NEW RIVER. *Wednesday,*
May 26th.

UPON appeal by the Governor and Company of the *New River*, against a poor-rate made for the liberty of *Little Amwell*, charging them in respect of land in their occupation in *Chadwell Mead*, on the ground that they were charged at a higher rate or sum than the real value thereof, and also at a higher proportion than the other occupiers of land in the same liberty, the court of quarter sessions for the county of *Hertford* confirmed the rate, subject to the opinion of this court on the following case :

In a rate duly made and published on the 26th of *August* 1812, for the liberty of *Little Amwell*, in the county of *Hertford*, the Governor and Company of the *New River* are rated as follows ;

Rental,

£300.—Governor and Company of the *New River* for
Land in *Chadwell Mead* - - - £15 0 0

The Governor and Company of the *New River* were incorporated by charter, dated 21st of *June* 1619, for the purpose of conveying water from a certain spring rising in *Chadwell Mead*, in the liberty of *Little Amwell*, to the cities of *London* and *Westminster* ; and
do

Land of which the annual value is improved by a spring rising within it may be rated to the poor at such improved value, although the owners of the land who are also occupiers do not receive any of the profits derived from the spring, nor does any part become due in the parish where the land lies.

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do supply a great part of the same with water, by means of a cut called the *New River*, leading from the spring to a head or reservoir at *Islington*, whence it is distributed by means of engines and pipes to the different parts of the metropolis, and from which the company receive considerable profit beyond the sum at which the property in question is rated. The water of the *New River* is derived from two sources, part from the river *Lea*, from which there is a cut communicating with the *New River*, near *Chadwell Mead*, and part from a spring rising and inclosed in a basin in *Chadwell Mead*, which is the subject of the present rate, and is the freehold of the *New River Company*, and in their occupation. The quantity of water derived from each of these sources is nearly equal. That part of *Chadwell Mead*, which is occupied by the company and is the subject of the rate, contains about two acres; it consists solely of the basin in which the spring rises, and so much of the cut from thence called the *New River* as lies in the liberty of *Little Amwell*, where it joins the water taken from the river *Lea*, and from thence it continues to run with the said water so taken from the river *Lea* in one joint course to *Islington*. The said land alone without the spring, and if it were not covered with water, is of the annual value of 5*l*. The whole profits of the company arise from the sale of the water, no part of which is distributed, nor is any of the money received for it by the company, nor does any become due in the liberty of *Little Amwell*. If the advantage which the company derive from the use of the spring may by law be included in the rate upon the land, the land and the spring of water together are of the annual value at which they are rated.

Bourchier

Bourchier, in support of the order of sessions, after observing that this was a rate on land which the sessions had found to be of the annual value of 300*l.*, contended that the circumstance of the company being owners as well as occupiers of the land could make no difference when the annual value was once ascertained, although that circumstance, from there being no rent, might create a greater difficulty in ascertaining such value. He relied on *Rex v. Miller (a)*, as decisive of and not distinguishable from the present case. It may perhaps be argued that in that case the water of the spring which was held to be part of the produce of the land was consumed and became profitable on the land, whereas here it is carried to a distance before it makes a return, and therefore the land is not profitable within the liberty; but that is an argument founded upon false premises, assuming that land cannot be profitable unless the produce be consumed or converted into money within the parish; which is confounding the profits with the produce of land. To yield profit the land must be productive, but the produce need not be converted into profit on the land or within the parish; which in many cases is impossible, and in most very unusual, and must depend altogether upon the distance of the market. Land producing corn, or land under which veins of coal are worked (*b*), is rateable in the parish where it is situate, although the produce is disposed of and becomes ultimately profitable at distant markets. The case of *Rex v. Miller*, therefore, is in all its bearings in point; and has no distinction in fact, unless that being a mineral spring and this a spring of common water can be called a distinction. As to any supposed analogy between this

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(a) *Cowp.* 619.(b) *R. v. Parrot*, 5 *T. R.* 593.

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and the cases of tolls upon canals, it will be found upon a very slight examination of the principle which governs those cases, that no such analogy prevails. Tolls are held not to be rateable except in the parish where they become due for this reason; because they do not exist as tolls until the voyage in respect of which they accrue is completed, and then only they have a locality; which reason, it is difficult to apply to land. Neither is *Rex v. Sculcoates* (a) applicable; because that case turned altogether upon the absence of any assignable benefit arising to the commissioners from the drainage; here it is found that the company do derive a benefit, which is capable of and has in fact been estimated. In *Rex v. The Corporation of Bath* (b), the Court were of opinion that the corporation were rateable for their springs and reservoirs in the parish where those reservoirs were situate, not because the profits were received, but because the property was productive within the parish; but that they were not rateable for profits derived to them from the use of land in other parishes; but here the company is not rated for such profits. All that is done here is to rate the company in respect of land found to be in their beneficial occupation, including a spring as a part of the produce of such land, the annual value of which has been ascertained.

Berens, Trollope, and Walford, contra, contended that this rate could not be supported at all, or at all events not to the extent imposed. There must not only be an occupation, but a beneficial occupation in the parish where the land lies, which imports something accruing to the occupier of the land in that parish. And *Rex v. Miller* is consistent with this doctrine; for it was there

(a) 12 Baff, 40.

(b) 14 East, 609.

stated that the profits arose from the sale of the mineral water, and the company resorting thereto, which therefore must have been received in the parish. A similar observation may be made on the case of the coal-mine; for it does not appear but that the coals were sold at the pit's mouth. But *Rex v. Sculcoates* seems decisive, inasmuch as it was there considered that parties are not rateable merely in respect of their occupation, unless the property yield a pecuniary benefit within the parish. Now that applies directly to this case, where it is expressly stated that no part of the profits either become due or are received within the liberty; and therefore if the property be rateable there, the company will be liable to a double rate, being rateable also in the several parishes where the profits are received; for that was so decided in *Rex v. The Corporation of Bath*. It is said that here is land in the company's occupation, but it does not therefore follow that they are rateable: in *Rex v. Sculcoates*, Lord *Ellenborough* C. J. said, "I know of no instance where a canal company has been held rateable for the mere space occupied by the canal if no tolls were received or became due there; and I cannot distinguish between land converted into a drainage and a canal." So here it may be said the company are not rateable for the mere space occupied by the basin and spring, if no profit is received or becomes due there: and this principle is strictly analogous to all the cases from *Rex v. Page* (a) downwards, respecting the rateability of tolls.

LORD ELLENBOROUGH C. J. This is a rate imposed on land, including a spring of water, as being of the aggregate annual value of 300*l*. The case finds, "that the land alone, without the spring, and if not covered

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(a) 4 T. R. 545.

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with water, is of the annual value of 5*l.*; but if the advantage which the company derive from the use of the spring may by law be included in the rate upon the land, the land and spring together are of the annual value at which they are rated." Much of the argument against this rate seems to me to be built on a perversion of the terms of this finding. We are desired to read the case as if the words were "if the *whole* advantage of the concern may be included in the rate;" whereas nothing like that is stated; but only "if the advantage which the company derive from the use of the spring:" and the rate is expressly stated not to be imposed upon the whole advantage which they derive. I am at a loss, therefore, to discover between this case and *Rex v. Miller* any other distinction than that which has been alluded to, viz. that the quality of the two waters is different, the one being a mineral and the other plain water. It has been assumed, indeed, that in that case all the profits were received in the parish where the land lay; but the case does not warrant any such conclusion; and we know perfectly well that the mineral water in question in that case is disposed of in great quantities at distant places. It may be said also that in this case the owners of the property are also the occupiers, but there the property was in the occupation of a tenant; to which the answer has already been given, viz. that that circumstance is no otherwise material than as it affords a more easy criterion for ascertaining the annual value. Here, then, is land, and water inclosed in a basin upon the land, which falls within the legal description of land; and although a considerable portion of the profits of such water is derived from pipes, through which it is distributed to other places, yet it is found that the water has a certain ascertained value at the fountain-head: and

in

in cases of this kind it is enough to ascertain the local value of the property, without inquiring whether it yields a return on the spot. A degree of confusion has arisen from comparing this to the case of tolls upon canals; whereas they are essentially different; for tolls are an incorporeal hereditament, and have no local corporeal existence so as to be the subject of rate until they become due. Then we have been pressed with the case of *Rex v. Sculcoates*, where it was holden that the commissioners in whom a drainage was vested were not rateable; but that was so holden upon the principle that where there is not a scintilla of benefit derived from the occupation, the property is not rateable: there the commissioners were merely servants of the public, having no divisible fund in their hands either as trustees or to their own benefit, and deriving no advantage from the drainage; and the only persons benefited by it were the owners of lands in other parishes. In *Rex v. Bath* it was assumed in the decision, that the water was the subject of rate in the parish where it was impounded in the reservoirs; the only question there being, whether the corporation were rateable in that parish to the extent of all the profits received by them, or whether the rate ought not to have been framed with reference to the contributory profits derived to the company in other parishes. Without going farther into the several cases upon this subject, and feeling no disposition to overrule the case of *Rex v. Miller*, I think there is no doubt that the sessions have come to a right decision. The property is locally valuable in the parish where it is rated, although that value is derived from extrinsic circumstances, and although the profits are actually received elsewhere.

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GROSE J. No person considering this case can entertain a doubt. It is admitted that the spring and the land in which it rises are the freehold of the company, and in their occupation. The only question is, whether it is a beneficial occupation. Upon that subject there cannot be a reasonable doubt; for it is stated in the case, that the land including the spring is worth 300*l.* per annum, and that the company do derive a considerable profit from it. It would be strange, therefore, if the Court should hold that it is not rateable. I cannot distinguish this case from the common case of land on which corn grows. In such case the land is assessed according to its value, and that value is estimated according to that which it produces: so here the land produces a spring, and the value of it is to be computed according to the benefit which the spring produces to the company. I say nothing as to the quantum of the rate, that being a question wholly in the discretion of the sessions: here we have only to decide on the rateability of the property.

LE BLANC J. The question arises on the validity of a rate made for the liberty of *Little Amwell*. By that rate the *New River Company* are rated for land at a certain sum; which rate is imposed on them as occupiers of local corporeal property within the liberty. No rule is clearer than this, that it is not the business of this Court to enter into inquiries as to the value found by the sessions, whether it be estimated at too high a rate or not. The sessions may possibly have put too high a value on the property, but with that question this Court does not interfere, nor indeed is it submitted to us. The only question upon which we are required to deliver

deliver our opinion is, whether this property be rateable, and whether the sessions, in forming their judgment on that point, have taken into their consideration circumstances which they ought not. The subject-matter of the rate is land: and the case states that the land taken independently of the spring, is of the annual value of 5*l.* only; but if the spring and the advantage derived from it by the company may be taken into consideration, then the land is not rated at more than its value. That brings it to the question, whether in estimating the value of land, something which is peculiar to the land, and makes it more profitable to the occupier than if it were away, can be taken into consideration: and that question has already been determined in *Rex v. Miller*, which, as it seems to me, cannot be distinguished from the present case. That was a case where land, being rendered more productive by reason of a mineral spring arising within it, was held rateable at such increased value. The only feature of distinction between the two cases is this, that here the company do not receive any of the profits of the water on the spot, whereas it is contended that in *Rex v. Miller*, it may fairly be presumed (for it is not so stated in the case) that the profits were received at the fountain-head in the parish where rated; but does it make any difference to the occupier whether he takes the profits of his land by selling the produce on the land itself, or by disposing of it elsewhere? Suppose a man occupying land out of which he digs brick-earth, and converts it into bricks in an adjacent parish; would he not be liable to be rated as for brick-land in the parish where the land lies, in the same manner as if he had sold the bricks in that parish? Particular expressions taken from cases dissi-

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milar in their circumstances have been dwelt upon, in order to impress upon the Court the rule that there must be a beneficial occupation in the parish; to constitute which it is said that the profits must be received there. But the cases of tolls are by no means applicable, which are only of value at the place where they become due, and not like land which is of a certain permanent value in the place where it is situate. With respect to *Rex v. Sculcoates*, that case proceeded on the ground that the parties rated had not the beneficial occupation of any property whatsoever which could be the subject of rate; but here the company are found to be in the actual occupation of land which produces a profit. Whether they are liable to be rated in every parish through which the line of river passes is a question which at present it is not necessary to determine: nor is it material for us to inquire whether the sessions have made a higher estimate of the profits than they ought to have done. It is sufficient for our decision that it is found by the case, that there is an occupation of local and visible corporeal property within the liberty, which is rendered of greater value by reason of the spring, than it would be without. Under these circumstances, unless we were to overturn the case of *Rex v. Miller*, we must hold this property to be rateable.

BAYLEY J. I think it is clear, that the company are liable to be rated for the spring, which is part of the produce of the land. The company have the means of carrying this produce to market, where it affords a beneficial return; and it can make no difference whether they convey it along a canal or in carts and waggons or by any other mode. It is still the produce of the land,

which, when brought to market, produces a profit. The case of tolls upon canals is perfectly distinguishable, because tolls exist as local visible property in the parish where they accrue, and before they can be rated all the cases have held that they must exist as a toll; but this is a rate on land situate in the parish. The fallacy of the argument lies in applying to land a rule applicable to one species of incorporeal property, and deducing from thence that the profits of land must be rated in the parish where they are received, and not where the land lies; and that this company is liable to be rated in that parish to the full extent of the profits received. But this is not a rate on the profits which the company acquire, but on the land which they occupy. The question then is, what land do the company occupy within the liberty, not what profits do they receive there; and what is its annual value. It appears that they occupy this land, the value of which is improved partly by the spring, and partly by reason of channels and pipes in other lands, through which the water is conveyed to the consumer. Perhaps, therefore, it may be fair that in fixing the quantum of rate on this property respect should be had to the benefit which results to the company in the different parishes through which the water is conveyed. But this observation applies only to the quantum, with which we have nothing to do: here it is quite clear that the company have a beneficial occupation of land in *Little Amwell*, and are therefore liable to be rated.

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Order of Sessions confirmed.

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Wednesday,
May 26th.

The KING *against* The Inhabitants of BUBWITH.

Renting the tolls of a bridge, vested by act of parliament in a company of proprietors who are declared a corporation, will confer a settlement, although the tolls are made *personal* estate, and the renting is not stated to be by deed.

The 13 G. 3. c. 84. (General Turnpike Act), which prohibits persons from gaining a settlement by renting the tolls of turnpike roads, does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road.

THE court of quarter sessions for the East Riding of the county of *York* discharged an order of two justices for the removal of *John Massey*, his wife and children, from the township of *Bubwith* to the township of *Foggathorpe*, both in the East Riding, subject to the opinion of this Court on the following case :

It appeared to the Court that the said *John Massey* had become settled at *Foggathorpe* by hiring and service, but that after having obtained such settlement, he rented for one year the tolls and toll-house of *Bubwith* bridge, in the township of *Duffield*. Those tolls were collected by virtue of an act of parliament passed in the 33d year of his present majesty, intituled "An act for building a bridge over the river *Derwent*, at or near *Bubwith* ferry, in the East Riding of the county of *York*, and making proper approaches thereto;" which act is agreed to be taken as part of this case (a). The tolls and toll-house were of the annual value of 70*l.* The value of the toll-house alone was less than 10*l.* per ann.

Topping and *Holroyd*, in support of the order of sessions, by way of anticipating an objection that might be made on the authority of *Rex v. Chipping Norton* (b), viz. that this

(a) By that act the bridge, toll-house, and approaches thereto are vested in a company of proprietors, who are declared to be a body corporate, and they are authorized to demand and receive for their own proper use and benefit for pontage, as or in the name of a toll, before any passage over the said bridge is permitted, certain specified sums, and the said tolls are also vested in the company. And it is also enacted that the shares of the proprietors shall be deemed personal estate.

(b) 5 *Eist*, 239.

being

being a renting of tolls belonging to a corporation, the case should have stated the renting to have been by deed; contended that the term renting implied a renting under such demise as the parties were competent to make, which could not be implied in the case alluded to, because there the renting was expressly stated to be by verbal agreement. That objection failing, they maintained on the rest of the case that this was such a tenement as would confer a settlement; for although the toll-house was not of the annual value of 10*l.*, yet coupled with the tolls, it exceeded that value; and tolls, according to *Co. Lit. (a)*, are a tenement for which an assize lay at common law, and so it was resolved in *Webb's case (b)*, and in *Rex v. Chipping Norton*, Lord *Ellenborough C. J.* considered that the taking of tolls would confer a settlement.

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Richardson, contra, contended that these tolls did not amount to such an interest in land, as would constitute a tenement; they were merely payments for the liberty of passing over the bridge, which the act has declared to be personal property. The proprietors, therefore, could only demise such an interest as the act vested in them, which was only a personal interest belonging to them as adventurers in the bridge. Besides, there is a further objection arising upon the 13 *G. 3. c. 84. s. 56.* (the General Turnpike Act) which prohibits any gatekeeper or person from gaining a settlement by renting the tolls of turnpikes, or residing in any toll-house; and although the present act has no similar clause, yet the bridge, being a part of the turnpike, falls within the provisions of the general act: it is true, the bridge is not

(a) 19. b. 20.

(b) 8 *Rep.* 46. b.

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tants of
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expressly vested in the trustees of the turnpike ; but still it must be considered as a branch of the turnpike. In *Rex v. Elvet* (a) it was so considered, although the words turnpike-road were not used in the local act.

LORD ELLENBOROUGH C. J. It is true the words turnpike-road did not occur in the act upon which *Rex v. Elvet* was decided. But the commissioners under that act were trustees of the road ; and it was to all intents considered as a turnpike road. As to the renting, it is enough for us to decide on the doubts which the sessions actually entertained ; and they have not stated any doubts upon that subject ; for they have stated simply that the pauper rented the tolls, which must be understood a legal renting. Then the only question remaining is, whether tolls are a tenement. There is no doubt that they are so generally ; but it is said that here they cannot be so, because the act has made the shares of the proprietors personal estate. That, however, does not make them less a tenement in the hands of the persons to whom demised : suppose the act had vested the shares in the proprietors for a term of years, they would still have been a tenement.

LE BLANC J. In *Rex v. Elvet* the Court deemed it a turnpike-road ; the act enabled the commissioners to erect turnpikes on the high road.

Per Curiam,

Order of Sessions confirmed.

(a) 11 East, 93.

1813.

GLADSTONE and Others, Assignees of JAMES SILL and WILLIAM WATSON, Bankrupts, *against* HADWEN. (a)

Friday,
May 28th.

TROVER by the plaintiffs, as assignees of *Sill* and *Watson*, who carried on trade at *Liverpool* under the firm of *James Sill* and Company, against the defendant, for the recovery of the value of divers bills of exchange, amounting to 1810*l.* 16*s.* 6*d.*, and of a certain draft drawn by the defendant on his own bankers for 2139*l.* 6*s.* 6*d.*, and of two Bank of *England* notes for 5*l.* each. At the trial at *Lancaster*, at the summer assizes 1811, a verdict was found for the plaintiffs for 1820*l.* 16*s.* 6*d.*, subject to the opinion of the Court on the following case :

On *Thursday* the 25th of *October* 1810 *James Sill* applied to the defendant for the loan of 8000*l.*, telling him that he was in want of that sum to meet certain acceptances of *Sill* and Co., part of which would be due on the *Saturday* and part on the *Wednesday* following, and that he would give him ample security. The defendant thereupon delivered to *Sill* bills of exchange to the amount of 1860*l.* 14*s.* 6*d.*, and also a draft drawn by the defendant on his own bankers for the sum of 2139*l.* 6*s.* 6*d.*, but which was never accepted, and received from *Sill* as the security proposed a certain paper writing addressed to him (the defendant) to the tenor following ;

Where *S.* obtained bills of exchange from the defendant upon a fraudulent representation that a security given by him to the defendant (which was void) was an ample security, and on the next day having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one, which had been discounted), and also two bank-notes, part of the proceeds of such discount, and the defendant delivered back the security, and after-

wards a commission of bankruptcy issued against *S.*, the assignees under which commission brought trover against the defendant for the bills and bank-notes: Held that the defendant was entitled to retain them.

(a) This case was argued at *Serjeants' Inn*.

“ We

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"We having a right to hold two hundred and fifty tierces of coffee, now landing from the *Fanny* from *Jamaica*, or the proceeds thereof, for securing to us a sum of six thousand pounds or upwards now owing to us by *Thomas Hinde*, we delegate that right to thee for the purpose of securing out of the debt due to us, any balance we may owe thee not exceeding the sum of six thousand pounds. (Signed) *J. Sill and Co.*"

"*Liverpool*, 25th of 10 mo. 1810."

The coffee mentioned in the paper writing delivered by *Sill* to the defendant, was the property of another person, over which, in fact, *Sill* had no control, nor any lien whatsoever, but which *Sill* and *Co.* had before pledged as far as they could with another creditor. *Sill* having received the bills of exchange and draft, sent them on the same 25th of *October*, by the post, to his partner *William Watson*, who was then in *London*, directing him to retain them until 12 o'clock on *Saturday*, and then, if he did not hear from *Sill* to the contrary, to deliver them to *Richardson, Overend, and Co.* of *London*, to whom *Sill* wrote, by the same post, to the following effect :

"With the inclosed 16 bills, value 4000*l.*, please to cancel our acceptance to *W. P. Hutchinson* for 2466*l.* 19*l.* 5*d.*, due 27th inst., and the balance pay to *Lefevre and Co.* to be placed to the credit of *Thomas Ainsworth and Co.*" (Signed) *J. Sill and Co.*"

"*Liverpool*, 10 mo. 25th, 1810."

"Since writing the above we have considered to inclose the bills specified above to our *Wm. Watson*, who is in *London*, and who will wait upon you with them, which you will please apply as above. *J. S. and Co.*"

On the 26th of *October* *Sill* resolved to stop payment, and having come to that resolution, sent off a messenger

messenger express to *London*, for the purpose of stopping the bills and draft, and preventing the same from being paid to *Richardson, Overend, and Co.* The messenger arrived in *London* on the morning of the 27th of *October*, and stopped the bills and draft in the hands of *Watson*, who had not at that time received the bills, but received them about an hour afterwards; and then immediately returned to *Liverpool*, and arrived there on *Saturday* the 28th of *October*, bringing with him the draft and the bills, except one for 49*l.* 18*s.*, which he had discounted, and out of the proceeds of which he brought two Bank of *England* notes for 5*l.* each, which he immediately delivered to *Sill*. On the 26th of *October*, after *Sill* had sent off the messenger to *London*, the defendant applied to *Sill* for the numbers and particulars of the casks of coffee mentioned in the security, when *Sill* informed him that he had felt uncomfortable, and had resolved to go no farther, and had sent off a person to *London* to stop the bills and draft, and that he expected them down again from *London*, and would return them to the defendant. In the evening of *Saturday* the 27th of *October* *Sill* caused the partnership books of account to be removed from their counting-house to his private dwelling-house, and on the morning of *Monday* the 29th of *October* *Sill* and *Watson* respectively committed acts of bankruptcy. On the same day, after the acts of bankruptcy had been committed, *Sill* sent to the defendant the draft and bills, (except that for 49*l.* 18*s.*), and two Bank of *England* notes for 5*l.* each, part of the proceeds of the said bill for 49*l.* 18*s.*, and the defendant received the same and delivered up the paper writing which was delivered to him as a security. On the 6th of *November* following a

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commission of bankruptcy issued against *Sill* and *Watson*, who were duly declared bankrupts, and an assignment of their estate and effects was made to the plaintiffs, and the defendant converted to his own use the bills, drafts, and bank-notes so received by him.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover: if they are so entitled, the verdict is to stand for 1810*l.* 16*s.* 6*d.*, and 10*l.*, both or either of those sums as the Court shall direct: if not, a nonsuit to be entered.

Richardson, for the plaintiffs, contended that this case presented the common case of a loan upon security, which security afterwards turns out to be bad; and that *Sill* having made no communication to the defendant of his intention to rescind the loan by returning the bills, until after he had determined to stop payment, was not then in a condition to exercise an election. The promise to return the bills was made in contemplation and upon the eve of bankruptcy, and was void as being a fraudulent preference; and the bills were not returned until after the bankruptcy; and even then not in their entire state, but after one of them had been discounted; which shews that the bankrupts had the control over the whole: the defendant, therefore, had no right to retain them. At all events, he is not entitled to the two bank-notes, for by discounting the bill the bankrupts made the proceeds their own, whatever may be the right as to the remaining entire bills, and they had the bank-notes in their possession, order, and disposition at the time of their bankruptcy within the 21 *J. l. c.* 19. But that the property in the whole passed to the bankrupts at the time of the first delivery of the bills to *Sill* by the defendant,

may

may be further illustrated by analogy to cases in the criminal law. Suppose the question had arisen upon an indictment against *Sill* for a felony, and it had appeared that he obtained these bills by this fraud; could there have been a doubt upon adjudged cases that he would have been entitled to an acquittal, on the principle, that where the owner intends at the time to part with the property, it cannot be a felony? Perhaps, therefore, the defendant could not have maintained trover for these bills against the bankrupts themselves, supposing them not to have become bankrupts; for it might have been said, that he had actually parted with the property to them; but admitting, in that case, that the bankrupts would not have been entitled to retain by reason of their fraud; still innocent assignees may be entitled to hold for innocent creditors where the bankrupt would not.

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Littledale, for the defendant, insisted that the delivery of the bills to *Sill* worked only a change of possession and not of property. It was obtained by fraud and under a false pretence of the value of the security given in exchange; and where a party exchanges one thing for another, knowing the thing that he offers in exchange is not his own, there no change of property takes place, but only a mere change of possession. Perhaps no case will be found expressly deciding that position; yet in *6 Mod. 114. Anon.*, *Holt C.J.* inclined to the opinion that a sale of goods on credit obtained by fraud, would not alter the property: the contrary indeed seems to have been held in *Parker v. Patrick (a)*, but there the rights of third persons intervened; and, therefore, supposing that

(a) 5 T.R. 175.

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decision to be right, the general rule will still hold good, that as between the parties themselves every contract founded in fraud is void. Even a sale in market overt, if made by covin, will not bar him that hath the right (a). The cases alluded to from the criminal law proceed on a rule peculiar to cases of felony, and altogether foreign to other cases; which rule requires that there should be a trespass in the taking before it can amount to felony; but a delivery obtained by fraud may be such as does not amount to felony, and does yet not pass the entire property to the person obtaining the delivery. Perhaps in this case the delivery of the bills to the bankrupts passed to them a qualified property, as a delivery of goods by the vendor to a carrier passes a qualified property to the vendee; yet if he become insolvent the vendor may stop them in transitu. So here, the transfer being incomplete by reason of the fraud, the condition on which the bills were parted with altogether fails, and the contract becoming a nullity ab origine, the defendant has a right to get back his bills. Therefore he might have brought trover for them, or if the bankrupts or the assignees had received the money, assumpsit would have lain against them, for they would have been holden trustees for the defendant, and as such bound to restore it. In *Harrison v. Walker* (b), where the assignees received the money under circumstances very similar to the present, it was holden that the owner of the bills might recover it from them in an action for money had and received, Lord Kenyon C. J. observing that the assignment under the commission passes only such property as the bankrupt is conscientiously entitled to. Now here, as between the bankrupts

(a) 2 Inst. 713. Sir W. Jones, 164.

(b) Peake's N. P. C. 111.

and the defendant, a court of equity would have ordered the bills to be returned, considering the bankrupts as trustees for the defendant. But the assignees take subject to all equities and liens which would have attached upon the property in the hands of the bankrupts; and only take what the bankrupts are conscientiously entitled to: they are, therefore, trustees for the defendant, or rather they do not take at all; for the bankrupts had no beneficial interest. Neither they nor their assignees could have maintained any action on the bills, because it might have been proved that they gave no consideration for them; *Rees v. Marquis of Headfort* (a). But, lastly, admitting the contract to have been binding, the parties have rescinded it, by mutually giving up the securities on each side; and although it is said that this agreement was made in contemplation of bankruptcy, and not executed until after the bankruptcy, and therefore shall not prevail; it will be found that that rule applies only to cases where the creditors are defrauded, by the agreement, as in *Barnes v. Freeland* (b); but if it be such as ought in conscience to be performed, the assignees will be bound to carry it into effect. With respect to the bank-notes, there seems to be no reason why the right to them should not follow the right to the bills.

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Richardson in reply. It will be found that the principle on which the cases of felony proceeded is general, and applies as well to cases of contract, as to other cases. The principle is, that if goods or money be delivered upon a contract, such property passes to the bailee as will satisfy the intention of that contract; therefore if

(a) 2 Campb. N. P. C. 574.

(b) 6 T. R. 80.

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delivered with the intention of receiving the identical thing back again, the possession only is transferred ; but if there be a delivery of goods on sale, or of bills or money in payment or upon a loan outright, or upon security, the property passes. *Rex v. Parks* (a), *Coleman's case* (b), *Atkinson's case* (c). *Parker v. Patrick* (d) was an express decision that the property passed notwithstanding the goods were obtained by fraud : and in *Power v. Wells* (e) it was held, that fraud in a warranty made by one party to a contract did not enable the other party to rescind it. So here the defendant trusted to a warranty. If then the property once vested, the assignees cannot be affected by any thing done afterwards by the bankrupts to divest it ; for they were not competent to bind the assignees, who represent the creditors at large, and not merely the bankrupts, and derive their title by law through the assignment of the commissioners ; and even if the bankrupt has the order and disposition of property without the right at the time of his bankruptcy, no subsequent act of his can affect the rights of the assignees. In *Hartop v. Hoare* (f), the defendant was held liable for jewels pledged to him, because the party pledging them had no right to bind the plaintiff, whose property they were. As to the right of stoppage in transitu, that is founded on an implied proviso in every contract of sale, that until the goods are paid for the seller may resume them ; but there the right must be exercised before the goods come into the hands of the vendee. With respect to *Harrison v. Walker*, perhaps what is reported to have been said by Lord Kenyon goes somewhat too far ; for a

(a) 2 East's P. C. 671.

(b) *Ib.* 672.(c) *Ib.* 673.

(d) 5 T. R., 175.

(e) Dougl. 24. in not. S. C. Cowp. 818.

(f) 1 Willf. 8. 3 Atk. 44. Str. 1187.

legal title is sufficient for assignees; and the case itself is not in point, because there the bills did not come to hand until after the bankruptcy.

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LORD ELLENBOROUGH C. J. If there had been no bankruptcy in this case, it is quite clear that *Sill* and *Watson* could not have maintained any action against the defendant, who has only got back by consent what one of them obtained from him by fraud. How far, the bankruptcy having intervened, the assignees are identified with the bankrupts, is a different question. There are cases which the Court certainly would not adopt without some limitation.

The case was reserved for consideration, and on this day

LORD ELLENBOROUGH C. J. delivered the judgment of the Court. After stating the facts of the case, his Lordship said: The question is, whether *Sill* and Co. had such a property in the bills of exchange, &c. as passed to their assignees. We are of opinion that they had not. In this case bills were obtained by the bankrupt (*Sill*) under a false pretence of giving the defendant an ample security, by delegating to him a right to hold coffee; whereas the coffee (which was the security pretended to be given) was the property of another person, over which *Sill* had no control or lien, or if he had, had before pledged it in favour of another creditor. The bills therefore appear to have been obtained by a criminal fraud. It has been argued, indeed, on behalf of the assignees, that the property vested in them under the commission; and in support of the argument it is sup-

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posed that by analogy to cases in the criminal law, the property may be considered as having passed from the defendant to *Sill and Co.*: but if it did, it was under such circumstances as a court of equity on a bill filed would have directed the property to be restored. If that be so, we think it would be useless for a court of law to permit that to be recovered which could not be retained one moment. In *Scott v. Surman (a)*, *Willes C.J.* says, "My notion is, (and that opinion is confirmed by many authorities cited by Mr. *Durnford* in a note,) that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estate of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts. And I found this opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely upon the rule concerning circuitry of action. For I think it would be absurd to say that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them, by which they will be obliged to refund and account, and according to the case of *Burdett v. Willett*, will likewise have costs decreed against them, and so the effects of the bankrupt, which ought to be applied to the discharge of his debts, will be wasted to no purpose what-

(a) *Willes*, 402.

ever." On these principles, and on the authority of the cases cited, we are of opinion that the assignees are not entitled to recover this property, which if they were to recover, a court of equity would compel them to restore, but that the defendant is entitled to retain it. A distinction has been raised in argument as to the bank-notes, and it has been urged as to them that although the assignees might have no right to the bills as long as they remained undisposed of, yet they are entitled to the proceeds when discounted; but we think that as the bank-notes were not mixed with the rest of the bankrupt's property, and are capable of being distinctly traced, they stand in the same position as the bills themselves, and therefore cannot be recovered.

Judgment for Defendant.

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LEYCESTER and Others *against* LOCKWOOD.

Friday,
May 28th.

COVENANT by the plaintiffs, as surviving partners of *Stamp Brooksbank*, and *Thomas Hankey*, deceased, for non-payment of an annuity. The deed set forth on oyer, which was dated the 25th of *June* 1793, and made between one *Francis Boynton* of the first part, *Peter Acklom* and the defendant of the second part, and the plaintiffs and their deceased partners of the third part, recited deeds of lease and release of the 1st and 2d of

Where the grantor of an annuity by deed conveyed to the grantees all his estate in the interest of 10,000*l.*, in trust for himself until default in payment, and after default to retain thereout the arrears, &c., and after re-

taining the arrears, upon farther trust for himself: Held that a memorial, which stated that the interest of the 10,000*l.* was by the deed conveyed to the grantees upon the trusts thereby declared, was defective; although the grantor had not the legal estate in the interest of the 10,000*l.* at the time of his conveyance of it to the grantees, but the same was vested in trustees in trust for him after deducting certain annual payments, and the trustees did not join in conveying their interest to the grantees.

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May 1788, by which certain estates of *Boynton* were conveyed to *P. Acklom* and the defendant, as trustees, to sell and pay off two mortgages, and after payment thereof to invest 10,000*l.* at interest, and out of the interest to pay *Lydia*, the wife of *Boynton*, 200*l.* a-year during the joint lives of *Lydia* and *Boynton*; reciting also, that *Acklom* and the defendant sold the said estates, paid off the mortgages, and retained 10,000*l.*, and had lent out the sum of 4000*l.* at interest upon mortgage, and also 6000*l.*, the residue, to the defendant upon the like security; reciting also, that through mistake it was not declared in the deed of 1788 that the residue of the yearly interest of the 10,000*l.*, after payment of the 200*l.* to *Lydia*, was to be paid to *Boynton*, the said *Acklom* and defendant covenanted to stand possessed of such residue, (after payment of 200*l.* and a further sum of 20*l.* agreed to be allowed to *Lydia*,) in trust for *Boynton* during the joint lives of himself and wife, and to pay the same to him or as he should direct or appoint, and in case he should survive his wife, then to pay the whole interest to him for his life, (after deducting an annual sum not exceeding 260*l.* for the maintenance of children;) reciting also that *Boynton*, on the 22d of *February 1793*, agreed with the plaintiffs and their deceased partners for the sale of an annuity of 110*l.* for his life, and on the 3d of *June 1793* for the sale of another annuity of 30*l.* for his life, and that it had been agreed to consolidate the two into one annuity of 140*l.*, payable quarterly, and for that purpose *Boynton* had given a bond and warrant of attorney thereon to the plaintiffs and their deceased partners, conditioned for the payment of the said annuity; the said *Boynton* thereby conveyed to the plaintiffs and their deceased partners

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the interest of the two principal sums of 6000*l.* and 4000*l.* secured by the said mortgages, after payment thereof of such yearly sums as aforesaid, and all the estate, &c. of *Boynton*, or of any person in trust for him, in the interest of the said 10,000*l.*, or any part thereof, to hold the same *in trust for him until default in payment of the annuity, and after default in trust to retain thereout the arrears and expences incurred by reason of the non-payment, and after retaining the same then upon trust that they should pay the residue to Boynton or such person as he should appoint; and the better to enable the plaintiffs and their deceased partners to recover the payment of the interest so assigned, Boynton appointed them his attornies, and in his name or their own names to sue for, recover, and receive the same from P. Acklom and the defendant or the survivor, to give receipts for the same, and to bring actions or suits in his or their name for that purpose: and the defendant and P. Acklom jointly and severally covenanted with the plaintiffs and their deceased partners to pay out of the interest of the 10,000*l.* trust monies the said annuity of 140*l.* during the life of *Boynton*, &c.*

There were several pleas upon which objections were raised and discussed in the course of the argument; but as the Court ultimately decided upon one alone, it is only material to state so much of the last plea as gave rise to that objection. That plea stated that no other than the following memorial was inrolled. It then set forth the memorial verbatim, which was a memorial of the bond, warrant of attorney, and indenture (25th June 1793,) declared upon, as to which indenture, after stating the parties thereto, and grant of the annuity, &c. it went on thus: "which said annuity is by the said inden-

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indenture farther secured by and out of the interest and annual produce of two several principal sums of 6000*l.* and 4000*l.* secured by the several mortgages in the said indenture recited and described, &c. and which interest or annual produce is and are by the said indenture assigned and conveyed unto the said plaintiffs and their deceased partners, *upon the trusts thereby declared.*" Demurrer and joinder.

Bowen in support of the demurrer, upon the objection that this memorial states the interest of the two principal sums of 6000*l.* and 4000*l.* to be conveyed to the plaintiffs upon the trusts in the indenture declared, without stating what those trusts were, admitted that since the cases of *Denn v. Dolman* (a), *Defensans v. O'Bryen* (b), and *Defaria v. Sturt* (c), he could not contend that if trusts be created, they need not be disclosed in the memorial; but he submitted that here no trust was created, because no estate passed to the plaintiffs. *Acklom* and the defendant stood possessed of the whole of the interest on the 10,000*l.* as trustees during the life of *Boynton*, and they have not joined in assigning over any part of it to the plaintiffs. *Boynton* alone assigns to them; and executes a power of attorney to enable them to recover the interest in his name as it becomes due, which would have been perfectly nugatory if the assignment vested the interest in the plaintiffs as trustees. If this had been a leasehold estate, *Boynton* would have been the cestui que trust, and as such could have conveyed no legal interest to his assignee by this assignment. In *Denn v. Dolman*, *Askerw v. Mackreth* (d), and the other cases, there was a good conveyance of the legal estate to

(a) 5 T. R. 641.

(c) 2 Taw. 225.

(b) 3 East, 559.

(d) 1 New. Rep. 214.

the trustees, whereas here the only parties competent to assign did not join in the assignment. *Boynton's assignment* could at the utmost only give a power to the grantees to distrain, but such a power is not required to be set out (a) in the memorial. If the grantees are trustees at all, they must be trustees for themselves, which is not a very usual course of exercising trusts.

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Coltman contra. If the argument were tenable that this assignment by *Boynton* to the plaintiffs conveyed to them no estate, because it was a mere trust estate in *B.*, and therefore required no memorial, it would afford an easy mode of defeating the provisions of the annuity act (b). The grantor of an annuity would have nothing to do but to convert his legal into an equitable estate, and then he might assign in trust what portion of it he pleased without the necessity of a memorial. The same argument would also have been an answer to several of the objections taken to the memorial in *Bradford v. Burland* (c), because there the estate on which the annuity was secured was the trust estate of the wife, and it might therefore have been said that no memorial was necessary; but it does not appear that any such answer was attempted to be given; and in that case the Court were strongly impressed with the objection, that the trust in favor of the grantor of the annuity, until default in payment and 20 days afterwards, was not truly stated (d). Here the plaintiffs are trustees for *B.*, as well until default in payment, as also after the arrears are satisfied.

(a) *Per Mansfield C. J. Defaria v. Sturt*, 2 Taunt. 232.

(b) 17 G. 3. c. 26

(c) 14 East, 445.

(d) *Ibid.* 461.

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And these are not merely resulting trusts, but are expressly created by the deed; and though it may be said that they would have by law resulted without any such express provision, that will not make it less requisite that they should be stated in the memorial. In *Defensans v. O'Bryen* (a), the trust was of that nature, and yet the omission was held fatal; and in *Taylor v. Johnson* (b), a memorial omitting a trust in favour of the grantor until default in payment of the annuity, was holden to be defective; and *Lawrence J.* observed, "that the memorial ought to have stated all the trusts contained in the deeds for securing the annuity; as well those which were intended for the benefit of the grantor, as those for the benefit of the grantee."

Bowen in reply, enforced his former objection to the plaintiffs being trustees, as well from the inconsistency of their being trustees for themselves, as from their being treated in every other part of the deed, except where these supposed trusts were created, as grantees only. In all the cases referred to an interest was vested in third persons as trustees for the purposes of the deed, and therefore it was holden that the memorial must disclose the trusts; but in this case no such interest is created.

LORD ELLENBOROUGH C. J. If this were *res integra*, I should have no difficulty in pronouncing the memorial sufficient. We have not in this case to struggle with the act of parliament, but with decisions. They are so many and so potent, that I feel it my duty to look into

(a) 3 East, 559.

(b) 8 T. R. 184.

them in order to guide myself through the quicksands which they have opposed to the attainment of justice in this case. The act of parliament is very specific, and is meant for a clerk to execute, and not for an acute lawyer. It requires that the memorial shall contain the day and year when the deed bears date; the names of the parties, and for whom any of them are trustees, and of the witnesses; the annual sum, and the name of the person for whose life the annuity is granted, and the consideration of granting the same; which means express consideration. These are the seven specific requisites of the act, which any clerk by looking into the deed may find without difficulty. But on the words "for whom any of them are trustees" a system has been engrafted (improperly, as it appears to me,) by a series of decisions, viz. *Taylor v. Johnson*, and others. In deference to those authorities we feel it necessary to look into them, lest we should disarrange them, or in any instance in which we have adopted them, contradict ourselves; happy if we are enabled to do justice to this case, notwithstanding those decisions.

Cur. adv. vult.

LORD ELLENBOROUGH C.J. now delivered the judgment of the Court.

This was a question arising upon the memorial of an annuity deed. By that deed, *F. Boynton* having agreed for the sale of two annuities to the plaintiffs, amounting together to 140*l.*, to be secured on the interest of two several sums of 4000*l.* and 6000*l.* vested in *Acklom* and the defendant as trustees, they (the defendant and *Acklom*), as trustees, covenanted with the plaintiffs to pay the said annuity out of the interest of the said 10,000*l.*

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Upon this covenant the action is brought against the defendant for non-payment of the annuity. By former deeds of 1788 certain estates of *Boynton* were conveyed to *Acklom* and the defendant on trust to raise 10,000*l.*, invest the same at interest, and pay thereout 200*l.* a-year to *Lydia*, the wife of *Boynton*. The 10,000*l.* were raised, and laid out on two several mortgages of 4000*l.* and 6000*l.*, and Mrs. *Boynton*'s annuity was increased to 220*l.*; and the trustees covenanted to stand possessed of the residue in trust for *Boynton*. By the annuity deed they are not made grantors of the annuity, nor do they assign their interest to the plaintiffs (the grantees), but only covenant to pay the annuity; but *Boynton* conveys all his estate in the interest of the two several sums of 6000*l.* and 4000*l.* to the plaintiffs, in trust for himself until default in payment of the annuities, and in case of default to retain to themselves the arrears, and after retaining the same upon farther trust for his benefit. The memorial, instead of specifying these trusts, only states that the interest or annual produce is by the indenture assigned to the plaintiffs *upon the trusts thereby declared*. This omission in the memorial is the main objection on which the defendant relies. And on consideration we feel ourselves constrained by the authorities to yield to it. The cases of *Askew v. Mackreth*, *Defensans v. O'Bryen*, and *Bradford v. Burland* all decide, that if trusts be created in an annuity deed, the terms and provisions of such trusts must be set forth in the memorial. In this case the surplus interest of *Boynton* is assigned upon trusts to the plaintiffs, and there are no trusts specified in the memorial. It has been argued indeed for the plaintiffs, that the assignment really passed nothing, and therefore that it was unnecessary to memorialize

realize the trusts thereby created. But we think it a misconception to say that it passed nothing, for the grantees were thereby entitled to sue the defendant and *Acklom* in the name of *Boynnton*; and where an annuity deed creates a trust to secure the annuity in favour of the grantee himself, although it is derived through the medium of a third person, it is notwithstanding a trust. For these reasons we think the memorial defective.

Judgment for the Defendant.

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STEVENSON and Another, Assignees of COLLIS,
a Bankrupt, *against* BLAKELOCK, Gentleman.

Friday,
May 28th.

TROVER for an indenture of lease; there were two counts, one upon a conversion before the bankruptcy, laying the property in the bankrupt; another laying the property in the plaintiffs as assignees on a conversion after the bankruptcy. Plea, general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Trinity* term 1812, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:

For some time before the month of *July* 1809, the defendant had been employed by the bankrupt in various matters as his attorney and solicitor, and in that month, in consequence of a request from the bankrupt, made out his bill for the business so done, upon which a ba-

An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment; therefore where C. gave his attorney a specific sum for the purpose of satisfying a debt for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a

lease which had been deposited by C. with B. as a security for the debt: held that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came to his hands, some of those acceptances when the lease did come to his hands having been dishonored, and one of them taken up by the attorney.

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lance of 300*l.* appeared to be due to him ; but neither that bill nor any other was ever delivered to the bankrupt. Upon being informed however of this balance by the defendant, the bankrupt requested him to draw bills upon him for the amount, and accordingly upon the 25th of *August* 1809, the defendant drew five several bills of exchange upon the bankrupt, which the bankrupt accepted, all dated on that day, and payable to the defendant's order, which bills were for the several sums and payable at the several times following, viz. : one for 50*l.* at one month after date, due 28th *September* 1809 ; another for 50*l.* at six weeks after date, due 9th *October* 1809 ; another for 100*l.* at two months after date, due 28th *October* 1809 ; another for 50*l.* at 70 days after date, due 6th *November* 1809 ; and another for 50*l.* at three months after date, due 28th *November* 1809. The two first of these bills were, before they became due, indorsed and delivered by the defendant to *W.* and *S.*, to whom he was indebted in the whole amount. When they became due they were dishonored by the bankrupt, but remained in the hands of *W.* and *S.* at the time of the bankruptcy, and were proved by them under his commission. These bills, however, have since been taken up by the defendant, who has long ago discharged his debt to *W.* and *S.*, and the bills are now in his hands. The third bill for 100*l.* was also negotiated by the defendant to *C.*, to whom he was indebted, but this being likewise dishonored by the bankrupt was returned to the defendant for non-payment, and was taken up by him on the 29th *October* 1809, and has ever since remained in his possession. The bankrupt when he gave the bills expressed some doubt whether he should be able to provide for the other two at the time when they

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they became due, and requested the defendant not to circulate them, and therefore the defendant never parted with them, and they still remain in his hands, but they did not become due till after the bankruptcy. In *Trinity* vacation 1809, three writs of fieri facias issued against the bankrupt, one at the suit of *Barrow* and others, and two at the suit of other persons; under which the sheriff took possession of the bankrupt's goods, and threatening to sell the same, the bankrupt on the 31st *October* 1809 advised with the defendant about paying the debts for which the execution had issued, and gave him 260*l.* for the purpose of satisfying that at the suit of *Barrow* and others; and on the following day the defendant paid to the solicitors of *Barrow* and others the 260*l.* in discharge of their debt, and those solicitors thereupon delivered to the defendant the lease in question, which had been deposited by the bankrupt with *Barrow* and others as a collateral security for their debt. Judgments on several cognovits being payable on the 6th of *November*, the bankrupt found it impossible to continue his business, and it was necessary for him to submit to a commission of bankruptcy, and the defendant thought it advisable for him so to do. On the 2d of *November* the bankrupt committed an act of bankruptcy, and a commission thereupon issued under which the plaintiffs have regularly been chosen assignees. The defendant not having before delivered his bill of costs to the bankrupt, after the bankruptcy delivered it to the assignees, but his demand upon the bankrupt and the assignees is confined solely to the 300*l.* before mentioned. The bankrupt was legally intitled to the lease in question, which is still in the possession of the defendant, and which was demanded

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of him by the plaintiffs before this action was brought, but he refused to deliver it.

The question for the opinion of the Court is, whether under the above circumstances the plaintiffs are entitled to recover. If the Court should be of opinion that they are, then the verdict to stand, otherwise a nonsuit to be entered.

Gifford for the plaintiffs stated the question to be, whether the defendant had a lien upon the lease in question for any part of his demand against the bankrupt, for which the bankrupt accepted the bills of exchange; and contended that he had not, first, because the lease did not come to his hands in the usual course of his business, but as a special bailee; and secondly, because, admitting that the lien would otherwise have attached, he had waived it by taking the bills; and the lien being once discharged, could not revive. It must be admitted that an attorney has a lien on all papers and deeds which come to his hands in the course of his professional employment for the party; but then it is for the attorney to shew that the papers on which he claims a lien did so come to his hands. Now it appears that the lease in question was received by him for the specific purpose of being handed over to the bankrupt from *Barrow* and others, for which purpose the defendant was rather their agent than the agent of the bankrupt. He was bound therefore to deliver it over to the bankrupt on the behalf of *Barrow* and others, from whom he received it for that specific purpose alone. It might have been different if he had been instructed by the bankrupt to demand the lease. Secondly, as to the waiver; the right of an attorney to detain papers for his general balance being like other liens a right which arises

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by implication of law, the moment a special agreement is entered into, that right ceases. This is so laid down in 2 *Roll. Abr. tit. Justif. pl. 1. 2.*, in *Chapman v. Allen (a)*, *Brenan v. Currint (b)*, *Collins v. Ongley (c)*, and by *Popham C. J.* in the *Innkeeper's case (d)*. It may be said that those were all cases of antecedent special contracts; whereas in this the special contract took place after the lien attached; but the same thing occurred and was much considered in *Cowell v. Simpson (e)*, and it was determined that the lien no longer remained: there the Lord Chancellor said; "if the lien commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other." Great inconsistency would follow, if it were otherwise. Suppose the day after the bankrupt had given the bills for this balance, the lease being then in the possession of the defendant, the bankrupt had demanded it, could the defendant have insisted on detaining it unless he was paid the balance? How would that be consistent with his agreement the day before to take securities, postponing the payment to a future time? It may truly be said, therefore, that in the nature of the thing the one contract destroyed the other. And this is no hardship on the defendant, for by obtaining the bills he got a better security, viz. by the bankrupt's dispensing with the taxation of his bill. There is one respect, however, in which *Cowell v. Simpson* differs from this case, viz. that there the securities had not failed, the time for their payment not having arrived; whereas here three of the bills were due and

(a) *Cro. Car.* 271.(b) *Say. R.* 224.(c) 2 *Selwyn's N. P.* 1214, 3d edit.(d) *Yelv.* 67.(e) 16 *Ves.* 275.

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had been dishonored, and one of them was actually taken up by the defendant before the lease came to his hands; and on this distinction it may be argued, that the lien was only gone during the time the bills had to run, but on their dishonour revived; at least to the extent of the bill taken up by the defendant. But besides that the Lord Chancellor in the case cited said that it makes no difference whether the securities were due or not; such an argument will be found contrary to the whole course of decision, that a lien once gone cannot revive; and although that doctrine has been most frequently applied to cases where the lien was gone by parting with the possession, yet if by taking the security it be also gone, there seems to be no reason why the same doctrine should not also hold good in this instance.

Littledale contra. It is immaterial as to the question of lien, for what purpose an attorney receives the papers of his client, provided he receives them in the ordinary course of his business. Here that appears to have been the case; for although it is said that he had no instructions from his client to demand the lease, yet it was his duty, as his attorney, and acting for his interest, without any express instructions to get back the security when the debt was satisfied. The client cannot be expected to instruct him in every minute particular; and it would lead to subtle and refined distinctions, if the Court were in all cases to go into the question upon what occasion particular papers were put into the attorney's hands, before they decided as to the right of lien. In *Ex parte Sterling* (a), the Lord Chancellor said that in

(a) 16 Ves. 259.

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the ordinary case of lien he never heard of a question of that sort; and took the rule to be whether the papers came to the attorney in the general course of dealing with his client. On the second point, some of the authorities cited are very ancient, and perhaps they lay down a rule restraining the right of lien further than the modern understanding warrants; but however that may be, they do not bear upon the present case: for in all of them the express contract was made before, here it was after the lien commenced; and the rule was laid down with reference only to the particular lien to which the express contract applied, and not to a general lien. In *Cowell v. Simpson* the Lord Chancellor seems to have applied this rule to a general lien; but that case is very distinguishable, for there the solicitors had not only taken securities which were then running for their balance, but had got a judgment for it, by which the nature of their debt was totally changed. But that decision is not inconsistent with the doctrine that the lien may be suspended by taking the securities, and revive upon their failure; and there is not any authority to shew that in such a case it is gone for ever. In the case of parting with the goods there is an unconditional relinquishment of the subject-matter on which the lien is to operate; but taking security amounts only to a suspension of the demand during the time that security has to run. So if a man distrain for rent arrear, and take a promissory note for it, although he cannot distrain again before the note becomes due, yet if afterwards the note be not paid, he is remitted to his original right. The Lord Chancellor, indeed, in giving judgment in *Cowell v. Simpson*, is reported to have said that whether the securities are due or not, it makes no

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difference; but that was an observation which, though entitled to all respect, it may be remarked the case did not require. As to the supposed immunity from taxation of his bill which these securities are said to have given, it is a consequence which by no means followed the taking of them. (a)

Gifford in reply. It has not been shewn that the lease came to the defendant's hands in the course of his employment for the bankrupt; on the contrary, it appears that it was without his knowledge: but if it were otherwise, no case has been cited to impugn the authority of *Cowell v. Simpson*. As to the argument, that all the old cases apply to particular liens, whereas this is a general lien; it may be answered, that then they apply a fortiori to this case, because particular liens are favoured in law, but general liens are taken strictly. (b)

Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

After stating the material facts of the case, his Lordship said, the first question which arises on this case is, whether the defendant had a general lien as attorney attaching on the lease in question. Secondly, supposing such general lien would otherwise have attached, whether it is not precluded from attaching by the securities taken. The first impression on my mind was that the general lien would not attach. The lease did not appear to have come into the possession of the defendant as attorney in the ordinary course of business, but he

(a) 2 Atk. 29.

(b) 3 Bos. & Pul. 494. per Heath J. in *Houghton v. Matthews*.

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appeared rather a mere bailee; but on further consideration the possession seems to us to have been acquired by the defendant in the course of his professional business. It was incident to his duty to do that for his client, which the client, if well advised, would have done for himself. It became his duty, therefore, upon discharging the debt due to *Barrow* and others to receive back the lease which was pledged as a security for that debt. On the receipt of it for his client, under these circumstances, it became not only the subject of particular lien, but also, as one of the papers of his client, subject to the general lien. We are of opinion, therefore, that the general lien attached. Upon the second question, whether the lien was gone in consequence of taking the securities, the argument for the plaintiffs rests principally on the case of *Cowell v. Simpson*, in which case the solicitors for the defendant had taken two notes, payable with interest three years after date, for the amount of their demand. The Lord Chancellor observed, that "the solicitor taking a security which has three years to run, as the client may have occasion for his papers, there is as much reason that the lien should not accompany the security through that period, as in the instance of a trade; and the conclusion is equally difficult that the papers, if the client has occasion for them, could be withheld." The Lord Chancellor afterwards delivers his opinion, that "where these special agreements are taken the lien does not remain." I take the general rule of law to be, that where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise. But in the absence of any express contract, there may be a lien, and a right of action on an implied contract. In this case the attorney had a

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right of action on a quantum meruit, and a lien, which was not affected by his forbearing to sue. The right of suit and right of lien are distinct rights, both arising out of implied contracts, and both subsisting at the same time. It is unnecessary to canvass the doctrine in *Cowell v. Simpson*, inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case the bills have been refused payment. Assuming, then, the position of the Lord Chancellor to be correct, here there is the further circumstance of the bills being dishonored; which places this defendant in his original situation as to lien. We are of opinion, therefore, that the defendant is entitled to a general lien.

Judgment of nonsuit.

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CROSSE and Others, Assignees of FEA and Others,
Bankrupts, *against* SMITH, THOMPSON, and
Others. (a)

Monday,
May 31st.

ASSUMPSIT for money lent, money paid, money had and received, also for interest due, and upon an account stated; which several causes of action were stated to have arisen with the bankrupts before their bankruptcy: and also for money had and received, and for interest due, and upon an account stated; which several causes of action were stated to have arisen with the plaintiffs as assignees. Plea, general issue.

At the trial before *Thomson B.*, at the spring assizes 1811 for the county of *York*, the jury found a verdict for the plaintiffs for 3344*l.* 9*s.* 2*d.* damages, *i. e.* 3176*l.* 9*s.* 2*d.* principal money, and 168*l.* for interest thereon from the 12th *April* 1810 to the 4th of *May*, being the 4th day of *Easter* term 1811, subject to the opinion of this Court on the following case:

The plaintiffs, who are assignees under separate commissions issued against *Thomas, Magnus* and *William Fea*, on the 2d *May* 1810, and under another commission

Notice to the drawers of non-payment of a bill of exchange by sending to their counting-house, during hours of business on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place.

Persons who are bankers both for the

drawers and acceptor of a bill, and have received it from the drawers, and given credit for it in an account current between them, if before it becomes due they receive directions from the acceptor to stop the payment of it at the place of payment, and do so accordingly, are not bound to give notice of this circumstance to the drawers, but upon non-payment of the bill may look to the drawers, notwithstanding they have not given such notice: and they are not bound to apply the money of the acceptor in their hands in discharge of the bill; but if the drawers become bankrupt, it will constitute an item in the account between them and the bankers.

It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners, in trust for the rest, may be set off in an account current between them.

(a) This case was argued at *Serjeants' Inn*.

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against *John Fea*, on the 26th *July* 1810, brought this action to recover the amount of a bill of exchange for 3176*l.* 9*s.* 2*d.*, placed by the defendants to their own credit in account with the Messrs. *Fea*. Messrs. *Fea* were merchants, and the defendants bankers, at *Hull*. Messrs. *Fea*, in keeping their banking account with the defendants, used to carry into the defendants' bank such bills of exchange and acceptances as they received in the course of their business; the amount of which was placed to their credit in account, and the defendants furnished them with cash and bills of exchange, for the amount of which they were debited on that account; and interest was allowed on both sides of the account. Amongst the bills so carried in by Messrs. *Fea* previously to their bankruptcy, was one for 3176*l.* 9*s.* 2*d.*, dated *August* 9th 1809, drawn by them, payable eight months after date to their own order, upon *J. B. Tuke*, and by him accepted, payable at Messrs. *Smith, Payne and Smith*, bankers, *London*, which became due on the 12th *April* 1810. This bill was remitted by the defendants to Messrs. *Smith, Payne and Smith*, their correspondents. *Tuke* also kept a banking account with the defendants, as his bankers. On the 6th *April* 1810 *Tuke* desired the defendants to give directions to *Smith, Payne and Smith* not to pay the bill; in consequence of which the defendants gave them directions to that effect, and accordingly the bill was not paid by them, but was returned the day after it became due to the defendants under protest for non-payment; and the defendants received the bill and protest on *Sunday* the 15th of *April* 1810. At that time *T. Fea* resided about ten miles from *Hull*, *M. Fea* about one mile from *Hull*, and *W. Fea* in *London*, and *J. Fea* was abroad. On *Monday* morning the 16th of *April*,
 about

about half-past ten o'clock, the cashier took the bill and protest to the counting-house of Messrs. *Fea*, at *Hull*, to give notice of the dishonor. The outward door of the counting-house was open, but the inner door was locked. The cashier knocked and made noise enough to be heard if any body had been within; he waited two or three minutes, but nobody coming, he went away and returned to the defendants' counting-house. On his return to the defendants' counting-house he found Messrs. *Fea*'s attorney there, and informed him what he had done. The cashier also had seen one of Messrs. *Fea*'s clerks on that morning, before he had orders to take the bill to their counting-house; but though he then knew of the bill being returned, he did not inform *Fea*'s clerk of its being so. On the next morning, about half past ten o'clock, the defendants' cashier went again to the counting-house of Messrs. *Fea* for the same purpose, without effect, as on the preceding day; and on his return to the defendants' counting-house he again saw Messrs. *Fea*'s attorney, who was there about the business of Messrs. *Fea*, and informed him of what he had done. At neither of those times did the cashier leave any written notice of the dishonor of the bill. On the 16th of *April* 1810 *Tuke* stood indebted to the defendants on the balance of his cash account in the sum of 13,232*l.* 10*s.* 5*d.*, but the defendants held negotiable securities of *Tuke*'s to the amount of 16,489*l.* 1*s.* 2*d.* On the 4th of *May* 1810 *Tuke* stood indebted to the defendants on the balance of his cash account in the sum of 12,618*l.* 7*s.* 11*d.*; but the defendants then held negotiable securities of *Tuke*'s to the amount of 15,453*l.* 0*s.* 8*d.* On that day the defendants brought an action against *Tuke* as the acceptor of the above bill of exchange, and obtained

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tained a verdict therein, at the summer assizes 1810, for principal and interest due on the said bill; but a commission of bankrupt having issued against *Tuke* on the 17th September 1810, the defendants did not tax their costs or proceed to final judgment against him. At the time of *Tuke's* bankruptcy the defendants were indebted to him on balance of his cash account in the sum of 2752*l.* 16*s.* 3*d.*; and they also had for his use Messrs. *Feas'* acceptances for 724*l.* 5*s.* 11*d.*, but which were previously due and were returned dishonored. At the time the separate commissions were issued against *T.*, *M.*, and *W. Fea*, the defendants claimed to be creditors on the balance of their cash account with Messrs. *Fea* to the amount of 38,298*l.* 18*s.* 6*d.*, which sum they proved under those commissions; but the defendants at that time held bills of exchange to the amount of 47,252*l.* 18*s.* 11*d.*, including the bill for 3176*l.* 9*s.* 2*d.*, and which bills were in such proof stated to be securities in their hands for their debt. When the commission issued against *J. Fea*, the defendants claimed to be creditors on the balance of their cash account with Messrs. *Fea* to the amount of 21,292*l.* 11*s.* 10*d.*, their original debt of 38,298*l.* 18*s.* 6*d.* having in the interim been reduced to that sum by monies received by them from the bills deposited in their hands; which sum of 21,292*l.* 11*s.* 10*d.* the defendants proved under the separate commission against *J. Fea*, and in that proof stated the bills then remaining in their hands as securities for the same to amount to 29,460*l.* 16*s.* On the 11th June 1807 *Tuke* lodged with the defendants a joint and several bond from himself and three others to the defendant *Thompson*, in the penal sum of 2000*l.*, conditioned for payment to him, his executors, administrators, or assigns, of the sum of

1000*l.*

1000*l.*, together with lawful interest for the same, on the 11th *June* 1809. The defendants advanced *Tuke* 1000*l.* on the said bond by crediting his account for that sum. *Thompson's* name was made use of in trust for the defendants, and the 1000*l.* advanced thereon was the proper money of the defendants. The 1000*l.* and interest thereon from the 5th of *January* 1810 still remains due on the bond. In case the defendants have no right to place the above sum of 3176*l.* 9*s.* 2*d.*, or any part thereof, to their credit in account as aforesaid or to retain the same or any part thereof, the defendants would be indebted to the plaintiffs as assignees as aforesaid in that sum on the balance of accounts between the defendants and Messrs. *Fea* at the time of their bankruptcy.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover all or any and what part of the said sum of 3176*l.* 9*s.* 2*d.* If they are entitled to recover all or any part thereof, then the verdict is to stand, or to be entered up accordingly: otherwise, a nonsuit is to be entered.

Littledale, for the plaintiffs, insisted, first, that the defendants were liable for the whole sum for which the verdict was found, because they omitted to give due notice of the dishonor of the bill. They ought to have given the earliest notice possible, and to have informed the *Feas* of the direction they had received from the acceptor of the bill to stop the payment of it in the hands of the *London* bankers; but if they were not bound to do that, they ought at least to have given an effectual notice of its non-payment. The circumstance of the counting-house being shut upon two occasions did not dispense with farther exertions. They should have persevered

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from day to day, or should have left a notice in writing, or have transmitted one by the post with the usual direction, or, as one of the *Feas* lived at the distance of a mile only from *Hull*, they might have sent a messenger to him with notice of the dishonor. But, 2dly, supposing the notice was sufficient, still the plaintiffs are entitled to recover to the extent of 275*l.* 16*s.* 3*d.*, the balance due from the defendants to *Tuke* at the time of his bankruptcy; which balance, as holders of the bill accepted by him, they were bound to apply in discharge of the bill; and by 5 *G. 2. c. 30. §. 28.* to have had the account stated between them. That the defendants held the bill as their own, and not for the *Feas*, is clear from their having brought an action upon it against *Tuke*; whereas if they had considered the bill as belonging to the *Feas*, they ought to have returned it to them. The stat. 5 *G. 2. c. 30. §. 28.* positively directs that the balance of the account, and no more, shall be taken. It is their own fault, therefore, if they have not settled it in account with *Tuke*. But it may be said if the plaintiffs are entitled to this balance of 275*l.* 16*s.* 3*d.*, due from the defendants to *Tuke* at the time of his bankruptcy, that, on the other hand, the defendants ought to have the benefit of deducting the 1000*l.* due to them from *Tuke* on his bond; and if that claim depended upon priority of time, the bond having become due before the claim of the plaintiffs accrued, the defendants might be entitled. But there is an objection to their setting it off at all, because the bond is to *Thompson* alone; and though it be in trust for the rest, still they have but an equitable right, whereas the claim of the plaintiffs is a legal one.

Holroyd contra, upon the point of notice, contended that the counting-house was the proper place of address, and that the defendants had done all that the law requires for the purpose of giving notice; *Goldsmith v. Bland* (a). There is no authority to shew that they were bound either to write a letter or to leave a written notice: it is sufficient if the party goes at the usual hours of business to the house of business. According to *Marius* (b), "if a bill of exchange be drawn upon a man living at one place, payable to a man living at another place, and the money is not to be paid in the city or town where the party on whom the bill is drawn does dwell, but in some other city or town where the party to whom the bill is payable does live, when the bill falls due it is not necessary to seek further for payment than at the house or in the place where the bill is made payable." So here it was not necessary to seek further for the purpose of giving notice, than at the counting-house of the party who drew the bill, and it was their neglect that nobody was at the counting-house to receive it. With respect to the necessity of giving notice of the direction they had received from the acceptor to stop the payment of the bill, it would be strange, if such an obligation should be found to exist without one trace of it appearing in the books, or even a single dictum to that effect. The stoppage of the bill in the hands of *Smith, Payne and Co.* was not an act of the defendants, who were merely the channel through which the direction of the acceptor was conveyed, and were bound to convey it; they cannot therefore be considered as having by their act prevented the payment; and as to their knowledge beforehand that

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(a) *Barnes'* edition of *Boyley on Bills*, 127. (b) *Marius*, ed. 1670. p. 106.

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it would not be paid, it might as well be said if some person had come by the order of *Tuke* to acquaint them that the bill would not be paid, that they would have been bound to give notice. As to the claim of the plaintiffs to set the debt due from the defendants to *Tuke* at the time of his bankruptcy against this bill, the answer is, that whether they took it as their own bill or as the bill of the *Feas*, for which they gave credit as cash, they had equally a right to debit the *Feas* with the amount upon the failure of the acceptor, the bill being drawn and indorsed by them; and the *Feas* also becoming bankrupts before *Tuke*, the statute interposed at that time to state the account between them; and therefore there was no debt in respect of this bill existing between *Tuke* and the defendants at the time when he became bankrupt. But supposing there was, still the defendants were not bound under the circumstances to set their debt against it. At all events they are entitled to deduct the debt due from *Tuke* on the bond, which, according to *Bottomley v. Brooke*, *Rudge v. Birch*, and *Webster v. Scales* (a), must be considered as the bond of the defendants, though given to *Thompson* alone; and the words of the statute "mutual credit and mutual debt," are certainly large enough to embrace it.

Littledale, in reply, maintained that the defendants by complying with the direction of *Tuke* to stop the payment of the bill, had made themselves parties to its dishonor, and had been guilty of a breach of their duty to the *Feas*, for whom they were bound to take every step to further and not to prevent payment; and he likewise

(a) Cited in *Winch v. Keeley*, 1 T. R. 621, 2.

repeated the necessity of the defendants' giving notice to the *Feas* of that circumstance. As to the citation from *Marius*, it applies only to a presentment for payment; but it is quite another question whether the same sort of act, which might be good as a presentment against the acceptor, who is bound to know when the bill will be presented and to be ready to pay it, is sufficient as notice to the drawer, who is not bound to know when notice will be given.

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The case was reserved for consideration, and

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This case was argued at *Serjeants'-Inn*. The point upon which doubt was entertained was, whether sufficient notice was given by the defendants before the bankruptcy of the dishonor of the bill. The bill, which was dated the 9th of *August* 1809, for 3176*l.* 9*s.* 2*d.* at eight months after date, payable to the bankrupts' own order, and was accepted by *Tuke*, payable at *Smith, Payne and Co. London*, with the three days' grace, became due on the 12th *April* 1810. On the next day it was returned with a protest to the defendants at *Hull*, who received it on *Sunday* the 15th of *April*. On the *Monday* between 10 and 11 in the morning the defendants' cashier took it to the counting-house of Messrs. *Feas* to give notice, knocked at the door, and found nobody there. After waiting a few minutes he returned to the defendants' counting-house. On his return he saw the bankrupts' attorney, and told him what he had done. On *Tuesday* about the same time he went again to the counting-house without effect; on his return saw the bankrupts' attorney, and again informed him of what he had done; the defendants' cashier also saw one of *Feas'*

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clerks on the *Monday* morning ; but the cashier had not received at that time any orders to take the bill to the counting-house. These are the facts on which the notice of dishonor rests, with this additional circumstance, that one of the bankrupts was resident about 10 miles and the other about one mile from *Hull* ; but that we think immaterial, because the counting-house was the proper place where notice was to be given ; neither do we think it material that the defendants' cashier saw the bankrupts' clerk on the *Monday* morning, without communicating any thing to him ; nor, on the other hand, does it strike us as helping this notice of the dishonor that the defendants' cashier informed the *Feas'* attorney of what he had done ; because the attorney was not the proper person to give such notice to. That brings it to the question whether sending the bill by a clerk after 10 o'clock, and knocking and waiting at the counting-house door was sufficient notice in point of law ; and we think that it was. The period from 10 to 11 was a time during which a merchant's counting-house ought to be open, and some person expected to be met with there. The counting-house is a place where all appointments respecting the joint business, and all notices should be addressed, and it is the duty of the merchant to take care that a proper person be in attendance. It has, however, been argued that notice in writing left at the counting-house, or put into the post, was necessary ; but the law does not require it, and with whom was it to be left ? Putting a letter in the post is only one mode of giving notice, but where both parties are residing in the same post town, sending a clerk is a more regular and less exceptionable mode. The case of *Goldsmith v. Bland* before Lord *Eldon*, supports this doctrine. The only notice of the dishonor

of

of the bill was by a clerk of the indorsee, who went to the counting-house of the indorser, found the counting-house shut up and no person there; saw a servant girl, who said nobody was in the way, and he then returned without leaving any message. Lord *Eldon* told the jury that if they thought the indorser was bound to have somebody there, the notice was regular. The jury were satisfied that the hour was a proper hour, and that the defendant ought to have had a clerk there. So by a recent decision in this court, in *Howe v. Bowes* (a), we have held that if the makers of notes shut up and abandon their shop, it is substantially a refusal by them to pay. Another point made in this case was, that the defendants in consequence of being employed by *Tuke* had given directions to *Smith, Payne and Co.* not to pay the bill; and on this ground it was contended that the defendants could not charge the *Feas* by reason of the default of the acceptor, when they themselves by their notice to *Smith, Payne and Co.* were the cause of the non-payment of the bill; and that at all events the defendants ought to have given notice of this circumstance to the *Feas* their customers. But one part of that position, viz. that the defendants were the cause of the bill's not being paid, is not correct; for *Tuke* and not the defendants was the cause of the bill's not being paid. The defendants were no more the occasion of its not being paid, than the clerk or postman would be, who carried the directions of *Tuke*. They were the bankers of *Tuke* as well as the *Feas*, and as such were bound to follow his directions. As to the farther objection, that it was the duty of the defendants to give notice to the *Feas* of

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(a) 16 East, 112.

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these directions of *Tuke*; we think it was not: they acted confidentially, and were not at liberty to communicate the orders of *Tuke* without betraying their trust; besides, *Tuke* might have provided for the bill elsewhere. We therefore think this point also is in favour of the defendants. Then it is said that the defendants were bound to apply so much of the money of *Tuke* in their hands as would satisfy this bill; but to this it was answered, and we think rightly, that the *Feas* becoming bankrupt the defendants had a right to set off the amount of this bill in taking the balance between themselves and the *Feas*; and that the bill did not constitute an item in the account of the defendants with *Tuke* when he became bankrupt. The last point made, was that the defendants could not have applied the 1000*l.* advanced by them to *Tuke* in reduction of their balance due to him. The argument turns on the question whether the money secured by the bond was owing by *Tuke* to the defendants. The bond was executed by *Tuke* with three other persons, to one of the defendants in trust for the rest, as a security for 1000*l.* advanced by them by crediting him to that amount. Upon this statement can there be any doubt that the money advanced was due to the defendants? In every view of this case therefore we are of opinion that the plaintiffs ought not to recover.

Judgment of nonsuit.

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M'IVER and Another *against* RICHARDSON.*Monday,*
May 31st.

ASSUMPSIT on a contract by the defendant to guaranty the plaintiffs, together with the money counts. At the trial before *Bayley J.*, at the last summer assizes at *Lancaster*, a verdict was found for the plaintiffs for 3695*l.* 13*s.* 3*d.*, subject to the opinion of this Court on a case, which stated in substance as follows:

The plaintiffs and the defendant are merchants at *Liverpool*. Messrs. *Williams and Wilson*, of *Liverpool*, having contracted with *David Anderson and Co.*, at *Quebec*, for the building by them of a vessel in *Canada*, and having given orders to different tradesmen in *Liverpool* for supplying her with rigging and stores, part of which was sent out to *Quebec*, afterwards failed; and their assignees came to an arrangement with the tradesmen, under which the plaintiffs were appointed agents for the tradesmen, to take upon themselves the sole management and disposal of the goods, and were put into possession of them by the assignees at *Quebec*. The whole amount of the goods furnished was 3695*l.* 13*s.* 3*d.*, of which the plaintiffs themselves had furnished to the amount of 2091*l.* 11*s.* 7*d.* About the same time *Anderson and Co.* agreed with the assignees to take the ship on their own account, and applied to the plaintiffs to contract for the rigging, stores, &c., and upon the plaintiffs declining to act upon their credit alone, applied to the defendant, and obtained from him a paper, of which the following is a copy:

“ Messrs. *M'Iver and Co.*

“ Gentlemen, As I understand Messrs. *David Anderson and Co.*, of *Quebec*, have given you an order for

or any consent of the defendant that it should be a conclusive guarantie.

A paper writing was given by the defendant to *A.* (to whose house the plaintiffs had declined to furnish goods on their credit alone) to this effect: “ I understand *A.* and *Co.* have given you an order for rigging, &c., I can assure you, from what I know of *A.*'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guaranty you against any loss from giving them this credit;” which paper was handed over by *A.* to the plaintiffs, together with a guarantie from another house, which they required in addition, and the goods were thereupon furnished: Held that the paper did not amount to a guarantie, there being no notice given by the plaintiffs to the defendant that they accepted it as such,

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rigging, &c., which will amount to about four thousand pounds, I can assure you, from what I know of *D. A.*'s honor and probity, you will be perfectly safe in crediting them to that amount; *indeed I have no objection to guaranty you against any loss from giving them this credit.*

“(Signed) *John Richardson,*

“*Liverpool, 12th March 1811.*”

This paper was communicated by *Anderson* to the plaintiffs, who were not satisfied, but required, in addition, the security of another person, which was offered in a letter addressed to them by *D. Anderson and Co.*, of the 14th of *March*; which letter proposed that they (*Anderson and Co.*) should accept bills, payable the 1st of *April 1812*, for the value of the goods, amounting to 3575*l.* 17*s.* 8*d.*, of which the plaintiffs' share amounted to 209*l.* 11*s.* 7*d.*, and should put into their hands as guarantie the above letter of the defendant, and also Messrs. *Hurry and Co.*'s letter, stating that they (*Anderson and Co.*) had made over the ship to them for the purpose of enabling them (amongst other things) to retain so much as would guaranty the payment of their acceptances. To this letter the plaintiffs, on the same day, returned an answer, accepting the terms proposed. *Anderson* did not state to the defendant that the plaintiffs required the security of any other person, or give him any account whatever of the correspondence, or of any thing that had passed between him and the plaintiffs. *Hurry and Co.*, however, having declined to enter into any engagement, *Anderson* applied to *Pagett and Co.*, who gave a separate guarantie, which the plaintiffs accepted in place of that of *Hurry and Co.* On the 13th of *April 1811* *Anderson and Co.* wrote from *London* to the plaintiffs in *Liverpool*, inclosing the paper signed by the defendant, and also that signed by *Pagett*
 and

and Co., which they stated to be a letter from the defendant and one from *Pagett* and Co., guarantying the payment of rigging and fails, &c., and requested an order for delivery of the goods at *Quebec*. The plaintiffs having received these two papers, they and the other tradesmen drew bills of exchange for the respective amounts of their demands on *Anderfen* and Co., dated the 1st of *April* 1811, payable 12 months after date, which *Anderfen* accepted; and the necessary orders for the delivery of the goods were thereupon given by the plaintiffs to *Anderfen* and Co., which were accordingly complied with. None of these facts were communicated to the defendant, nor had he any knowledge of any part of the transactions after he had signed the above paper till applied to as after-mentioned. The credit for goods of this description, when sold in *Liverpool*, is very various; for cordage it is often 12 months, and for the other articles three or six months. In *January* 1812, before the bills became due, *Anderfen* and Co. failed, and the bills were dishonored, and notice of the dishonor was given to the defendant. The plaintiffs then applied to the defendant to make good to them the amount, which he refused, and thereupon the present action was brought.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the whole or any and what part of the amount: if the Court shall be of opinion that the plaintiffs are entitled to recover, the verdict is to remain, or to be entered accordingly; if not entitled to recover, then the verdict is to be vacated and a nonsuit to be entered.

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D. F. Jones, for the plaintiffs, contended, that the paper writing obtained from the defendant of the 12th of *March* 1811 was a perfect instrument of guarantie, on which an action was maintainable. There is no technical form of words peculiar to a guarantie, which is a mercantile instrument, and, like other mercantile instruments, is to be construed according to the intention of the parties, and not to be subjected to any nice verbal criticism. Applying this rule to the language of this instrument, the instrument is sufficiently plain and indicative of the parties' intent; but if there be any ambiguity on the face of it, the words are to be taken as strongly against the party giving the guarantie as the sense will admit of. So is the language of the Court in *Mason v. Pritchard* (a). That the plaintiffs (the party receiving it) understood the paper at the time as amounting to a perfect guarantie, is clear from their having furnished the goods, partly upon that security: and that *Anderson* and Co. (the party in whose favour it was given) did so, there can be no doubt, for they offered it to the plaintiffs *co nomine* as a guarantie. Why then should the defendant be supposed the only person who understood it otherwise? But it will be objected, that supposing this amounts to a guarantie, still the defendant is not bound by it, because he had no notice from the plaintiffs that they were content to take it as such; but the law does not require a notice of that sort; if it did, then it would be necessary to aver it specially in declarations upon guaranties; but for that no precedent will be found. The liability therefore of the defendant attached by executing the order for delivery of the goods to *Anderson* and Co., according to

(a) 12 *East*, 227.

Oxley v. Young (a); and was consummated by their failure. Nor was the guarantie discharged by any delay or laches of the plaintiffs, or by the acceptance of a second security. As to delay or laches, the plaintiffs gave the order for delivery of the goods at the same time that they drew on *Anderson and Co.* for the amount, and when the bills were dishonored they gave notice of the dishonor to the defendant, which was more than they were bound to do. As to the taking a second security, it was intended only as a farther security, and not as superseding the former; which is plain from the letters of the 14th of *March* and 13th of *April*, offering both as subsisting guaranties. It is true that the plaintiffs were not at liberty to deal with *Anderson and Co.* to the prejudice of the defendant, their surety; and if it could be shewn that their taking a double security had that effect, it might operate, according to what was laid down in *Gould v. Robson* (b), in discharge of the defendant. But the second security, so far from being prejudicial, was calculated to have the contrary effect; for in equity co-sureties are liable for contribution, though they become sureties at different times and by different instruments, *Deering v. Earl of Winchelsea* (c), and *Ware v. Horwood* (d); and therefore the defendant got an advantage by it which he had not before.

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Brougham, contra, insisted that the paper given by the defendant did not of itself import a guarantie, and that there was nothing extrinsic to supply that defect; in which view the absence of any notice on the part of the plaintiffs that they accepted it as a guarantie was meant

(a) 2 H. Bl. 613.

(b) 8 East, 580.

(c) 2 Dug. & Pull. 270.

(d) 14 Ves. 28.

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to be urged, and not as a want of compliance with a rule of law, that notice must be given in all cases. But in this case the paper writing, in its fair construction, imports nothing more than an assurance of the degree of confidence which the defendant entertained of *Anderson's* honor and integrity, and at the utmost amounts only to a tender of a guarantie, which has never been accepted. What, therefore, might have been made conclusive by a notice, now remains equivocal and cannot bind. In *Oxley v. Young* it will be found that notice of the acceptance of the guarantie was given to the defendant, for the plaintiff returned an answer to his letter, stating that in consequence thereof he proposed putting the order for the goods in hand; and that was the point fixed by *Eyre C. J.* when the guarantie attached. As to any expressions used in the letters written by *Anderson* to the plaintiffs, they cannot have the effect of making that a guarantie which was not so before. He then contended that at all events the plaintiffs could only recover to the extent of 2091*l.* 11*s.* 7*d.*, the amount of the goods furnished to *Anderson* by the plaintiffs themselves, as the guarantie (supposing it amounted to one) was personal to the plaintiffs, and could not embrace goods furnished by them on account of others. But the Court seemed inclined against him on this point, particularly as the paper itself mentioned goods to the amount of about 4000*l.*; and in the result this point became immaterial.

D. F. Jones, in reply, admitted that the question was reduced to one point, viz. whether the paper of itself amounted to a guarantie; as to which he urged the inconvenience of putting too strict a construction on in-

struments of this sort ; and relied, as before, on the rule laid down in *Mason v. Pritchard*.

Cur. adv. vult.

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LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an action against the defendant as guarantee of *D. Anderson* and Co. for goods which the plaintiffs were about to supply to them, but hesitated so doing upon their credit alone ; on which the defendant gave them the paper in question. Under what representation the defendant was induced to sign that paper we know not. The question mainly for our consideration was, whether the paper imports to be a perfect and conclusive guarantee, or only a proposition tending to a guarantee. And in the latter point of view the Court consider it. The paper was to this effect. (His Lordship then read the paper.) We do not know on what kind of previous application the defendant signed it, nor is there any subsequent circumstance stated in the case from which it can be collected. The paper therefore must be construed according to the plain natural import of its terms. The import is, that the party signing it understood that *Anderson* and Co. had given an order for goods amounting to about 4000*l.* ; that this order remained unexecuted ; and then, as if a question had been put to the defendant respecting the honour and probity of *Anderson* and Co., the defendant says ; I can assure you from what I know of *Anderson*, you will be perfectly safe in crediting them to that amount ; and then he adds, indeed I have no objection to guaranty you against any loss from giving them this credit : which words import, that if application were made he would guaranty ; but no such subsequent application was made,

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made, indeed it appears that a guarantie was obtained from another house. A considerable period elapsed, and it was not made known to the defendant until the failure of *Anderson* and Co. that his paper had ever been communicated to the plaintiffs. Considering this as a mere overture to guaranty, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted, or that there should have been a subsequent consent on his part to convert it into a conclusive guarantie. Under these circumstances, therefore, we think there must be

Judgment of nonsuit.

MEMORANDA.

BEFORE the commencement of this term, viz. on the 10th of *April*, *Sir Thomas Plumer*, His Majesty's Attorney-General, was appointed to the office of Vice-Chancellor of *England*, an office newly created by stat. 53 *Geo. 3. c. 24.*

And on the 4th of *May*, *Sir Willam Garrow*, the Solicitor-General, was appointed Attorney-General, and *Robert Dallas* Esq., one of His Majesty's learned counsel, having resigned the office of Chief Justice of *Chester*, was appointed His Majesty's Solicitor-General, and knighted. At the same time *Richard Richards* Esq., one of His Majesty's learned counsel, was appointed Chief Justice of *Chester*.

C A S E S

ARGUED AND DETERMINED

1813.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-third Year of the Reign of GEORGE III.

MEMORANDUM.

IN the last vacation Sir *Nash Grose*, Knt. resigned his seat on the Bench of this Court, and in the early part of this term, viz. on *Wednesday* the 23d of *June*, *Henry Dampier* Esq. was called Serjeant, and gave rings with the motto, "Consulta patrum," and was appointed to succeed Sir *Nash Grose*, and took his seat on the Bench on *Friday* the 25th, and was knighted.

At the end of this term *John Copley* Esq. was called Serjeant, and gave rings with the motto, "Studiis vigilare feveris."

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Friday,
June 18th.

HOLLAND *against* COOKE.

The defendant in a country cause is entitled to eight day's notice to plead, although he has appeared and is resident about two miles from *London*.

ON the last day of the last term *Marryat* shewed cause against a rule for setting aside an interlocutory judgment and subsequent proceedings for irregularity. Interlocutory judgment was signed for want of a plea; the action was a local action, and laid in *Surry*; the defendant appeared, and the declaration was delivered, with a notice to plead within four days, the defendant being resident at *Walworth*, about two miles from *London*; and the question was whether he was not entitled to an eight day's notice. It was contended that the rule which required an eight day's notice did not apply to this case, where the defendant was resident only two miles from *London*, and had appeared; the rule only applying to cases where an appearance is entered according to the statute. The general rule to plead is a four-day rule.

Espinasse contra, referred to the rule in *Tidd's Practice*. (a)

The Court adjourned it in order to look into the practice, and afterwards made the

Rule absolute.

(a) P. 357., 5th edit.

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HAGEDORN *against* REID.Saturday,
June 19th.

ACTION on a policy of assurance upon the ship *Fiesco*, at and from *Gluckstadt* and any port in the *Elbe* to any port in the United Kingdom. The declaration averred the interest to be in the plaintiff, one *Frederic Hagedorn*, and one *F. J. Schroeder*, in some counts separately, and in another jointly. Loss by capture. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last term, it appeared that at the time when the plaintiff effected the policy he was a merchant resident in *London*, his brother *F. Hagedorn*, at *Hamburg*, and *Schroeder* was domiciled at *Gluckstadt*, a *Danish* port, then in hostility with this country. The plaintiff and his brother were interested in one moiety of the ship, and *Schroeder* in the other, and the plaintiff had already received upon the policy a sum sufficient to cover the interest of himself and his brother. The ship sailed from *Gluckstadt* under a licence granted to *J. P. Hagedorn* (the plaintiff) of *London*, merchant, on behalf of himself and other *British* or neutral merchants, to import a cargo from certain specified limits, within which *Gluckstadt* was, in any vessel bearing any flag except the *French*. The plaintiff recovered a verdict for the amount of the defendant's subscription.

A licence to *J. H.* of *London*, merchant, on behalf of himself and other *British* or neutral merchants, to import a cargo from certain limits, within which an enemy's port is situate, in any vessel bearing any flag except the *French*, will protect a ship trading from that port, in which ship *J. H.* and an alien enemy are jointly interested; and therefore such interest was held insurable.

Topping moved to enter a nonsuit, on the ground that a joint insurable interest could not subsist between a *British* subject and an alien enemy; for as the latter could not have any property which could be protected by a substantive separate insurance, so the former by uniting

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it with his interest shall not be permitted to effect indirectly what cannot be done directly; and he cited *M'Connell v. Hector* (a), and said that there was not any case which authorized a *British* subject to trade jointly with an alien enemy. And as to the licence he contended that it did not extend to cover the present interest, being in terms expressly restrained to a *British* or neutral interest.

LORD ELLENBOROUGH C. J. The case resolves itself into a question upon the licence, for there is no doubt that this interest would not be protected by the policy without the licence. I entertained an opinion at the trial that this licence was intended to legalize a commerce beneficial to this country, and that in furtherance of that object the only restraint it imposed as to the ship, was that it should not bear the *French* flag; it is expressly, "in any vessel bearing any flag except the *French*." The consequence of such a licence is to make the interest in the trade licensed infurable.

LE BLANC J. The object of the licence was to protect a trade in every ship except one bearing the *French* flag; it would be nugatory if it were otherwise.

BAYLEY J. The true construction is that they might import a cargo in any but a *French* ship.

Rule refused. (b)

(a) 3 Bos. & Pull. 113.

(b) See 4 Taun. 4. *Feife v. Bell*.

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The BRISTOL and TAUNTON Canal Navigation
Company *against* Amos.

Saturday,
June 19th.

DEBT against the defendant as one of the proprietors of the *Bristol* and *Taunton* navigation, to recover 270*l.*, in respect of 27 shares in the said navigation, for a call made the 1st of *July* 1811, at the rate of 10*l.* for each share. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after *Hilary* term, it appeared that the company were incorporated by 51 G. 3. c. 60. (local act). (a) 'The defendant's name' appeared in the act, in the

By the 51 G. 3. c. 60. (local act) the register book of the *Bristol* Canal Company is evidence, in an action brought by them for call, of the defendant's being proprietor of the number of shares affixed to his name.

(a) The 76th section enacts, That for the better securing to the several subscribers their respective shares therein, the said company of proprietors, or their committee of management, shall, as soon as the same can or may be done, cause the names and additions of the several persons, who shall be entitled to any share or shares in the said undertaking, and the number of shares to which they shall be respectively entitled, and also the proper number, by which every such share shall be distinguished, to be fairly and distinctly entered in a book, to be kept by the principal clerk to the said company of proprietors, and after such entry, cause the common seal of the said company of proprietors to be affixed thereto, and shall also cause as many tickets or instruments to be prepared as there shall be shares in the said undertaking, bearing respectively the same numbers as in the book, and the common seal of the said company of proprietors to be affixed to each such ticket or instrument, and thereupon cause to be delivered to every subscriber towards the said undertaking, upon demand, a ticket or tickets, specifying the shares to which he or she is entitled in the said undertaking, such subscriber paying to the clerk to the said company two shillings and sixpence, and no more, for every such ticket or instrument, and such ticket or instrument shall be admitted in all courts whatever, as evidence of the title of such subscriber, his or her executors, administrators, and assigns, to the shares therein specified; but the want of any such ticket or instrument shall not hinder or prevent the owner of any shares from selling or disposing thereof, or from receiving annually his or her share of the profit of the said navigation in respect thereof.

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BRISTOL Canal
Company
against
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the list of original proprietors. His name also appeared upon the register book of the company, as proprietor of 27 shares; which book was made up by the treasurer, and the corporation seal was affixed to it, as required by the act, on the 31st Dec. 1811; but the original paper subscribed by the defendant himself, which was dated in April 1810, not being stamped, was not admitted in evidence. His Lordship was of opinion that the defendant's name appearing in the act was proof that he was a proprietor of one share, but he doubted whether there was evidence of his being a proprietor of more than one. A verdict therefore was taken for 10*l.*, with leave to move to enter it for 270*l.*, for which purpose a rule was obtained in the last term. Upon the rule afterwards coming on in the same term, the Court expressed a wish to see the register book, and the case stood over until this day, when the book was produced, and appeared to contain nothing more than the names of the proprietors,

Section 100. after providing a general form of declaration to be used by the company in any action to be brought by them for calls against the owners of shares in the said canal, enacts, That on the trial of any such action, it shall only be necessary to prove that the defendant or defendants, at the time of making such call or calls, was or were a proprietor or proprietors of such share or shares in the said canal, and that such call or calls was or were in fact made, and that such notice thereof was given as hereinbefore directed, *and the production by the principal clerk or other officer of the said company of the said register book, and of the minutes of the proceedings of the committee of management, and of the newspapers in which notice of the said calls shall have been or shall be advertised, shall be sufficient evidence in support of such action or actions, without proving the appointment of the committee, who made such call or calls, or any other matter whatsoever, and the said company of proprietors shall thereupon be entitled to recover what shall appear due, unless it shall appear that any such call was made contrary to the directions and restrictions in point of time or amount contained in this act.*

and

and the number of shares belonging to each, affixed to each name.

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BRISTOL Canal
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Topping, Marryat, and Pollock shewed cause, and contended that the defendant was only liable, as being a proprietor named in the act of parliament, in respect of one share. The act never meant to make the register book conclusive evidence against every person whose name was inserted in it to the extent of any number of shares. The 76th section directs a ticket sealed with the corporation seal to be delivered to each of the subscribers, and that such ticket shall be evidence of his title; if therefore a ticket was made out and delivered to the defendant, that would have been the proper evidence; if not, it was the fault of the company that none such was made. The 70th section does not dispense with the necessary proof of the party's being proprietor of the number of shares for which he is charged; on the contrary it requires, that the company at the trial shall prove that the defendant, at the time of making the call, was a proprietor of such share or shares, and that such call was in fact made, and that notice thereof was given. It goes on indeed to provide that the production of the register book, together with other documents, shall be sufficient, without proving the appointment of the committee who made the calls; the register book is therefore to a certain extent evidence, but not to the whole extent contended for; if it were, it would be charging one party conclusively with an act done without his assent by another party; for the book is made up by the committee in the absence of the person to be charged, and if it be evidence at all, it is conclusive evidence, inasmuch as the act goes on to provide that the company shall thereupon be entitled to recover, un-

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less it appear that the call was made contrary to the act. Such a construction however would be introductory of a novel rule of evidence ; and there is besides this peculiar objection to its admissibility in the present case, viz. that the book purports to have been made up nearly five months after the call, and therefore cannot be deemed evidence of the defendant's being a proprietor at the time when the call was made, unless it can be shewn to have a retrospective operation.

The Attorney-General, Abbott, and W. P. Taunton, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. It is clear on referring to the act, that the register book is to be admitted as evidence of the defendant's property in these shares ; and from an inspection of the book it appears that he held them as original shares, for upon every transfer of a share a memorial of such transfer is to be entered by the clerk to the company, and must appear on the book, and after a call is made no share can be transferred until the money called for in respect of the share shall be paid.

LE BLANC J. As the register book contains only the entries of the names of the subscribers, and the different shares annexed to each, and not any of the proceedings of the committee, it could only be with one object that the legislature directed it to be produced, namely, for that of proving the names and the number of shares.

Per Curiam,

Rule absolute.

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SCHACK and Another *against* ANTHONY.Saturday,
June 19th.

ASSUMPSIT for freight. The declaration stated that the plaintiffs were the owners of a vessel, called the *Susanna*, whereof *C. Janffen* was master, and that *C. J.* as agent for the plaintiffs, caused to be made a charter-party of affreightment under seal, (of which they made a profer), purporting to be made between *C. J.* as master of the said ship of the one part, and the defendant of the other part. It then proceeded to state the terms of the charter-party by way of inducement, which were for the delivery of goods, at certain stipulated freight, at *Pillau*; and after averring a delivery of the goods at *Pillau*, according to the bills of lading, concluded thus: "And thereupon in consideration of the premises and of such delivery of the goods, the defendant undertook to pay to the plaintiffs the freight due for the said cargo and voyage." 2d count, Indebitatus assumpsit for freight. At the trial before Lord *Ellenborough* *C. J.* at the *London* sittings after *Hilary* term, it was proved that the plaintiffs were the owners of the vessel, and that the defendant, who was of the house of *Muller* and Co. at *Konigsberg*, had entered into this charter-party, and that the goods were delivered as alleged in the declaration to *Muller* and Co., who were the consignees in the bill of lading. His Lordship, however, was of opinion that the action should have been brought on the charter-party; but he permitted the plaintiffs to take a verdict, with liberty to the defendant to move to enter a nonsuit.

Where the master of the plaintiffs' ship entered into a charter-party, as agent for the plaintiffs, with the defendant, a partner in the house of *M. and Co.* for the delivery of goods upon a stipulated freight, and the goods were delivered to *M. and Co.*, who were the consignees named in the bill of lading: Held that the plaintiffs could not maintain *assumpsit* against the defendant for the freight.

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In *Easter* term *Scarlett* accordingly obtained a rule nisi for that purpose, on the ground that the freight having been stipulated for by deed was not recoverable in assumpsit; and he mentioned *Richardson v. Hanson, N. P. Guildhall, 46 G. 3.* where it had been so ruled.

The Attorney-General and *Taddy* shewed cause, and denied that the rule, as to an implied promise being merged in a specialty, was applicable to any other cases than those where the implied promise and the specialty were between the same parties. Now here the parties are not the same; for the plaintiffs are not parties to the charter-party, nor are they named in it; neither is it binding on them; for the master could not bind them by an instrument under seal without an authority under seal for that purpose; which it does not appear that he had. It was therefore a mere personal contract between the master and the defendant. But admitting that the plaintiffs may be considered as parties to the instrument, still the rule will not apply, because the defendant in this action being one of the persons composing the firm of *Muller* and Company, and not having pleaded in abatement that all the partners ought to have been joined, this action, according to *Rice v. Shute (a)*, must be taken to be an action against all the partners; and if so, then the parties to the instrument and to this action are not the same, because only one of the defendants was a party to the charter-party; for one partner cannot bind the other partners by deed (b). The question then is, whether on account of a deed which has been executed between the master of the plaintiffs' vessel and one of the

(a) 5 Burr. 2611.

(b) *Harrison v. Jackson*, 7 Term Rep. 207.

partners in a mercantile house, the plaintiffs are precluded from having their action against all the partners of that house upon an implied promise for freight arising out of the acceptance of the goods under the bill of lading. They then referred to *Anon.*, 1 *Leon.* 293., and *White v. Parkin* (a), in order to shew that notwithstanding the existence of a deed assumpsit will lie.

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LORD ELLENBOROUGH C. J. If a bond were given to a trustee, it could hardly be contended that an action of assumpsit might be maintained by the cestui que trust for the recovery of the money secured by the bond. The case has been argued ingeniously; but it is quite clear that this action cannot be supported. A contract under seal is entered into by the captain on behalf of the plaintiffs with one of the partners in the house of *Muller and Company*; after which the plaintiffs chuse to bring an action of assumpsit against that very partner for the identical thing already contracted for with their own captain. There is no case where the interest being the same as that secured by the deed, it has been holden, that assumpsit will lie. In *Foster v. Allanson* (b) there were several things unconnected with the deed, which were included in the action.

LE BLANC J. No promise is stated independently of the charter-party.

BAYLEY J. The plaintiffs by suing the defendant alone treat him as the only member of the house. The case of *Rice v. Shute* has been much overstated; for that

(a) 12 *East*, 378.(b) 2 *Term Rep.* 479.

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only decided, that where the defendant does not plead in abatement, he is not at liberty to object that there were any other persons, joint contractors, with him.

Rule absolute.

Saturday,
June 19th.

MORRIS and Others, Assignees of SMITH and
Others, Bankrupts, *against* CLEASBY.

A broker, who pays to *A.* the price of goods sold by him for *A.* under a *del credere* commission, is entitled to set off the amount against the assignees of *B.*, for whom he bought the goods; and where the jury found a verdict disallowing such set-off, and it was doubtful on the evidence, whether the payment was made before disclosure of the name of *A.* to *B.*, the Court granted a new trial.

DECLARATION: In consideration that the bankrupts would deliver to the defendant goods to be sold on account of the bankrupts, the defendant undertook to sell them, and to render a true and just account of the sale, and of the monies arising therefrom. Breach; that the defendant hath not rendered to the bankrupts, or to the plaintiffs as aforesaid, a just and true account of the sale, or of the monies arising. 2d count, that the bankrupts had delivered goods to the defendant to be sold, but the defendant had not rendered a just account of the said goods. 3d count, for not rendering a just account after the receipt of the monies arising from the sale. 4th count, for not rendering a just account of the goods after the sale thereof. There were also the money counts, and an account stated. Plea, Non assumpsit, with notice of set-off.

At the trial before Lord *Ellenborough* C.J. at the *London* sittings after *Hilary* term, it appeared in evidence that on the 23d *October* 1810, the bankrupts ordered the defendant (a broker) to purchase for them, at his public sale, a quantity of spirit of turpentine for exportation. The defendant accordingly made the purchase for 1090*l.* 7*s.* 4*d.*, which was agreed to be paid for in bills at 2 months.

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The defendant did not mention to the bankrupts at the time of the purchase the name of the seller, nor did it appear in the bill of parcels, nor did the defendant deliver any written paper containing the name; but in fact the goods belonged to *Le Mesurier* and Co., and were sold by the defendant as their broker acting under a *del credere* commission; but the bankrupts never authorized him to guaranty their house to *Le Mesurier* and Co., or ever knew that he had so done. Soon after the purchase the bankrupts gave the defendant directions to ship the goods, who then for the first time informed them that *Le Mesurier* and Co. were the proprietors, and referred the bankrupts to them to get the necessary documents for shipping the goods; after which, the defendant paid *Le Mesurier* and Co. the price of the turpentine; but the precise time when he made this payment did not appear. The bankrupts having had several interviews with *Le Mesurier*, and difficulties having occurred in procuring the shipment, abandoned their resolution of shipping, and directed the defendant to re-sell the goods; who accordingly re-sold them at different periods, the first of which was on the 27th *November*, and the last on the 31st *Dec.* 1810. The produce of the re-sales was 683*l.* 4*s.* 5*d.* Before the time stipulated for the payment of the turpentine the bankrupts became embarrassed, and on the 10th of *January* 1811 stopped payment. The question was, whether the defendant was entitled to take credit in his account with the assignees of *Smith* and Co. for the price of the turpentines so paid to *Le Mesurier* and Co. His Lordship stated the rule to the jury to be this, that a factor represents his principal until the principal is disclosed, but when that is done, his character of factor is at an end, and the principal becomes the person to be

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dealt with. Until that time payments may be made by the factor, and be the subject of set-off by him in his account with the principal. The jury found a verdict for the plaintiff, without allowing the set-off, and in *Easter* term a rule nisi for a new trial having been obtained,

Park and *Reader* now shewed cause, and said, that this was an attempt to convert the broker into a principal; they relied on the rule as laid down at the trial, that if the principal be disclosed before the time when payment is made by the broker, the broker's authority ceases, and he is not entitled to pay; and contended that this rule applied whether the broker is acting under a commission *del credere* or not; because such a commission between a broker and one principal shall not operate to the prejudice of another principal. Applying then the rule to the present case, the defendant had no right, although he was acting for *Le Mesurier* and Co. under a *del credere* commission, to pay them for their turpentine to the prejudice of *Smith* and Co. the purchasers, after the time when *Le Mesurier's* name was disclosed to them; and if the defendant was not entitled to do this, neither can he be entitled to claim such payment by way of set-off.

The Attorney-General and *Parnter* contra, insisted, 1st, that the defendant was entitled to his claim of set-off. They observed that this was not a question between the two principals, *Le Mesurier* and Co. and the bankrupts, whether their rights were prejudiced, but between the broker and the bankrupts (his principals), whether there was any thing to shew that the bankrupts had interposed to prevent the broker from paying *Le Mesurier* and Co.

according to the usual course under a *del credere* commission: if there was not, then the defendant was entitled to pay; and such payment would form an item in the account between him and the bankrupts, who had got the turpentine, and to whom it made no difference, as far as appears, whether they paid *Le Mesurier* and Co., or allowed it in account with the defendant. If then the defendant was entitled to pay, he is entitled to set it off. But, 2dly, he is at all events entitled to claim this payment against the plaintiffs, who are the assignees of *Smith* and Co., by way of mutual credit (*a*); for though it may not be good as a set-off, yet, according to *Grove v. Dubois* (*b*), there is a great distinction between mutual credit and set-off; and the same distinction was recognized in *Cuming v. Forester*. (*c*)

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LORD ELLENBOROUGH C. J. In this case I have not seen, nor am likely to see, any thing to induce me to alter my opinion as to the right of the broker to receive payment until his principal appears. The moment however the principal does appear, provided it be before payment, he comes into his full rights to receive it; that is a rule for the protection of the principal. But yet if the principal authorize his agent to receive payment, such payment will be good against him. So under these circumstances if *Cleasby* had received payment, it would have been good; for to this extent we must give effect to the *del credere* commission, that it authorized him to receive payment, his principal not having countermanded such authority. The only point on which the question for a new trial is to be considered, is how far there was

(*a*) 5 *Geo. 2. c. 30. s. 28.*(*b*) 1 *T. R. 112.*(*c*) 1 *M. & S. 499.*

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a right of set-off or mutual credit as it regards the broker. If the broker continued the presumptive principal, unquestionably every right of set-off belonged to him which belonged to his principal, but when once the principal is disclosed, the right of set-off no longer continues. The question then must stand on the mutual credit. I wish to have it better ascertained, whether this be considered as a right of set-off or of mutual credit, when the disclosure of the principal took place.

LE BLANC J. I think, on the report read by my Lord, that the precise time when the money was paid does not appear. I assume the facts to be as stated at the bar, that the defendant was employed by *Le Mesurier* and Co. to sell the goods for them under a del credere commission, and that he did so sell them to the bankrupts, by whom he was employed to buy, without disclosing to them the names of *Le Mesurier* and Co., and that the bankrupts gave him an order to re-sell the same, which he did, and that payment was not made by him to *Le Mesurier* and Co. till after the disclosure of their names to the bankrupts. Upon this statement it strikes me that, this being an action by the assignees of the bankrupts, the defendant will be entitled, without breaking in upon any principle of law, to set off the amount of the price paid by him to *Le Mesurier* and Co. on account of the bankrupts. The rules of law as they regard principal and broker are for the benefit of the principal. The principal, who sells through the intervention of a broker, may interpose and require payment to be made to him, but after he has dealt with the broker as the real purchaser of the goods, which by the del credere commission *Le Mesurier* and Co. may be considered as having done, the
 broker

broker then stands in the situation of principal; and in that character he sells to the bankrupts on his own account. There is no person interested in contravening the justice of the case, that the defendant should be allowed in account that price, which the assignees now seek to take from him. The principal is entitled to claim his rights entire, without reference to what passes between the broker and the purchaser, but where no such rights intervene, the justice of the case is not to be defeated by the application of a rule of law made solely for the protection of the principal. The defendant is taken out of the rule of law the moment he has settled the full price with the principal, with whom he was bound to settle by virtue of the *del credere* commission.

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BAYLEY J. The justice of the case is clearly with the defendant. I think also the defendant is entitled both under his set-off and under his claim of mutual credit. There are many cases in which a factor may sue in his own name, where the balance between him and his principal is in his favour. Where the principal gives notice to the buyer not to pay the factor, the buyer will afterwards pay the factor at his peril; but where the principal enables the factor to sell without naming him, he makes the factor his agent, not only for selling, but for receiving the price. It seems to me that if the principal employs the factor to sell by a *del credere* commission, he wishes it to be understood that he looks to him for payment, and that he has no objection that the buyer should pay the factor. In *Houghton v. Matthews* (a), both *Chambre J.* and Lord *Alvanley* considered that the effect of a

(a) 2 B. & P. 429.

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del credere commission was to make the factor responsible, for the value of the goods, to his principal. *Chambre J.* refers to *Kruger v. Wilcox* for the general position that a factor has a lien for his general balance; and then he goes on to say, "that where a factor is in advance for goods by actual payment, or where he sells under a del credere commission, whereby he becomes responsible for the price, there is as little doubt that he has a lien on the price, although he has parted with the possession of the goods. If he acts under a del credere commission, he is to be considered between himself and the vendee, as the sole owner of the goods." Afterwards he refers to *Buller's N. P.* for what is there said, "that a factor's sale does by the general rule of law create a contract between the owner and buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him, and not the factor, the buyer would not be justified in afterwards paying the factor." But he goes on, "it is true Mr. Justice *Buller* adds, "yet, perhaps, under some particular circumstances, this rule may not take place, as where the factor sells the goods at his own risk; (*i.e.* is answerable to the owner for the price, though it be never paid;) for in such case he is the debtor to the owner, and not the buyer.'" And this doctrine, that where the factor acts under a del credere commission, he is the person warranted to receive the price from the vendee, falls in with the case of *Grove v. Dubois*. If it were otherwise, in what a situation would the factor be placed? He would still be liable under his del credere commission to his principal, and yet not have the means of getting the money into his own hands by calling on the vendee. How does this case stand? The defendant is allowed to

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them, upon a subject which from its nature rests in tradition. Therefore in *Nicholls v. Parker* (a) it was received upon a question of boundary between two parishes and manors; and it is understood to be the uniform practice of the Court of Exchequer, to admit it upon questions of modus, without regarding the distinction whether the modus pervades a whole parish or affects a particular farm only (b). It has also been the practice of the northern and western circuits to admit it: at the *Bodmin* summer assizes 1812, cor. *Graham B.*, *Sir A. Moleworth v. Brune*, the plaintiff, offered evidence of reputation as to the boundaries of a manor, which was received; and the plaintiff had a verdict, and no application was afterwards made for a new trial. So in *Stanley v. White* (c), upon an issue whether certain trees were the freehold of the plaintiff or the defendant, hearsay evidence was received at the trial at *Chester*, and this Court, upon a motion for a new trial, did not disapprove of it; and yet a right of a more private nature than that can hardly be conceived. Here, it may be observed, the question relates to a right which concerns an aggregate body of persons, and partakes of the nature of a public right; a fortiori, therefore, the evidence was admissible in such a case.

Lens Serjt. and *Bayly*, contra, contended, upon the last point, that it had been treated as if the admission of hearsay was a general rule of evidence, and not an exception to the general rule; whereas, on the contrary, the general rule is that hearsay evidence is not admissible, and its admission in any instance is only by

(a) 14 *East*, 331. n.(b) *Webb v. Potts*, Noy, 44.(c) 14 *East*, 332.

way of exception. Now the exception is that on general points and matters which concern the public such evidence is admissible; and the principle on which that exception is founded seems to be that in such matters all mankind is interested in preserving the evidence. In all the instances cited, where the evidence has been received, it will be found that they either involved questions of public right, or in some degree partaking of a public right. Under this head may be classed the boundaries of parishes or manors, which are more or less of public concern, and are frequently determined by a kind of *lex loci* pervading those districts. Perambulations are made from time to time, and the remembrance of them is preserved in a large body of persons by tradition from one to the other. Manors also have public courts in which the rights and customs of those manors are publicly discussed and recorded. Perhaps the case of a *modus* is *sui generis*; it has been considered in all its relations as a matter affecting the ecclesiastical establishment: but there is no reason for departing farther from the general rule upon an authority which, if not doubtful, is at least anomalous. The law in many instances distinguishes between custom and prescription, it permits one tenant claiming under the same prescription that another tenant claims to be a witness in support of that prescription, but not in support of the same custom. The true criterion then as to the admissibility of evidence of reputation seems to be that which was laid down by Lord *Kenyon* in *Morewood v. Wood*, and was afterwards agreed to by him in *Reed v. Jackson* (a); and the same was adopted *at nisi prius* in *Clothier*

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(a) 1 *East*, 357.

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v. Chapman (a). The evidence in *Stanley v. White* was not admitted as reputation, but as explanatory of an act done by the tenant in possession of the premises claimed by the defendant in derogation of that claim. In this case the claim is confined to a prescriptive right belonging to the individual owner of the *Gosbuisht* tenements, which is strictly a matter of private prescription. It is therefore, in such cases, better to adhere to the general rule, than by relaxing it to let in a species of evidence, which is at all times vague and inconclusive.

LORD ELLENBOROUGH C. J. The admission of hearsay evidence upon all occasions, whether in matters of public or private right, is somewhat of an anomaly, and forms an exception to the general rules of evidence. The question here is whether this is a case of a public or merely private right; and supposing it to be merely a private right, whether according to the habit and practice of the circuit on which it was tried reputation can be received. I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said, indeed, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights: but I must confess I have not been able to see the force of the principle on which that distinction is founded so clearly as others have done, though I must admit its existence; and it has not been controverted in argument to-day, that in the case

(a) 14 *East*, 331.

of public rights reputation is to be received in evidence. As to the nature of the right in question, I think it may be said in some sense to partake of the nature of a public right: although one individual only stands upon it in this instance, yet it is understood that there are others standing in *pari jure* with the defendant; therefore it may be considered in this view as a question between the plaintiff and a multitude of persons; though in other views perhaps it is hardly fair so to consider it, where the record shews it to be a question between individuals only, and not between a multitude of litigants. As to those cases where the evidence of perambulations is admitted, it is certainly in the nature of hearsay evidence not of particular acts done, as that such a turf was dug, or such a post put down in a particular spot; for that would amount to evidence of ownership; but it is evidence of the ambit of any particular place or parish, and of what the persons accompanying the survey have been heard to say and do upon such occasions. Reputation is in general weak evidence; and when it is admitted, it is the duty of the Judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have. It is stated to be the habit and practice of different circuits to admit this species of evidence, upon such a question as the present. That certainly cannot make the law, but it shews at least from the established practice of a large branch of the profession, and of the Judges who have presided at various times on those circuits, what the prevailing opinion has been upon this subject, amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both
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of the northern and western circuits. My learned predecessor, Lord *Kenyon*, certainly held a different opinion; the practice of the *Oxford* circuit, of which he was a member, being different; but he seems to have entertained that opinion as to rights purely of a private nature, and not affecting in any way a public interest. In the present case I am not prepared to say that the learned Judge did wrong in admitting this evidence: it is probable that I should have admitted it myself. Therefore I am not prepared to say that there should be a new trial.

LE BLANC J. I rather think that this evidence was properly admitted. The objection taken upon the evidence arises principally out of the examination of two witnesses, the first of whom speaks as to having heard his father, who was dead, say, that the occupiers of the two messuages called *Lower Goshuifsb* had the right of tillage over the common, and that no one else had; and the other witness speaks to the same effect. There are other parts of the evidence, where the witnesses depose to what deceased persons said at the time when this right of tillage was exercised. The question arose upon a claim of a prescriptive right of common; such a right as the party alleged to have existed beyond the time of legal memory; and the question is how that right is to be proved. First, it is to be proved by acts of enjoyment within the period of living memory. And when that foundation is laid, then inasmuch as there cannot be any witnesses to speak to acts of enjoyment beyond the time of living memory, evidence is to be admitted from old persons, (not any old persons, but persons who have been conversant with the neighbourhood where the waste lies over which the

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particular right of common is claimed,) of what they have heard other persons, of the same neighbourhood, who are deceased, say respecting the right. Thus far it is evidence as applicable to this prescriptive right, it being a prescription in which others are concerned as well as the person claiming it; because a right of common is to a certain degree a public right. And the only evidence of reputation which was received was that from persons connected with the district. In the same manner in questions of pedigree, although they are not of a public nature, the evidence of what persons connected with the family have been heard to say, is received, as to the state of that family. In like manner also upon questions of boundary, though the evidence of perambulations may be considered to a certain degree as evidence of an exercise of the right, yet it has been usual to go further and admit the evidence of what old persons who are deceased have been heard to say on those occasions. The rule generally adopted upon questions either of prescription or custom is this, that after a foundation is once laid of the right by proving acts of ownership, then the evidence of reputation becomes admissible, such evidence being confined to what old persons who were in a situation to know what these rights are, have been heard to say concerning them. The issue here was on the prescriptive right of common, and the evidence admitted was as to a right derogatory to that prescriptive right; which must be governed by the same rules.

BAYLEY J. I think the evidence of reputation was properly admitted. In cases of prescription, which must have originated beyond the time of legal memory, and of which it is impossible to establish the claim by evidence
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of the grant, reputation seems to be admissible, and therefore for that reason when instances have been adduced to shew the exercise of the right claimed, it is usual to admit it. But it is not necessary to go that length to-day; because this evidence falls within the instances put and agreed to by my brother *Lens*; viz. that it is evidence which refers to the *lex loci*, or to the mode in which a particular district is to be used, and to what is the general right as it concerns a multitude of persons within that district. Here is a common of considerable extent, on which it is admitted that a number of persons have a right to turn on. The question is, how that number of persons is entitled to use it. If the plaintiffs could establish their right to till the common in the way pleaded, those persons would have only a qualified right subject to an opposing right, which in many instances would deprive them of the enjoyment of their right; and therefore it seems to fall within the distinction laid down by my brother *Lens*. I take it that where the term public right is used, it does not mean public in the literal sense, but is synonymous with general; that is, what concerns a multitude of persons. Now this is a general right exercised by a variety of persons, though not a public right of common.

DAMPIER J. In all cases where reputation is admitted in evidence, it is necessary to lay a foundation for its admission by first proving an exercise of the right; for that lets in reputation. In public rights it is not disputed that reputation is admissible; and that it has been extended to other rights which cannot be strictly called public, such as manors, parishes, and a *modus*, which comes the nearest to this case. That, strictly speaking, is

is a private right, but has been considered as public, as it regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district. Here a private right is claimed by an individual, that is, a right of common over an extensive waste, over which many others have the same right, every year and at all times of the year; and this is opposed by shewing a right of tillage, and inclosure for that purpose; which is so far an abridgment of the general right of the whole body. We know it is frequent in the West of *England* for almost every person to have a right of common in respect of his tenement: if then any individual has a right which tends to abridge the right of the whole neighbourhood, the evidence of reputation is admissible. This is analogous to the cases of a *modus*, and of the boundaries of parishes and manors; and I know the evidence has been generally received on the Western Circuit. There may be particular cases where it would be difficult to press it; as in the instance of a mere private right of way claimed over a particular field; perhaps this distinction might not apply. But here the right claimed goes to abridge the rights of all the persons concerned over a large district of common, and therefore I think this evidence is admissible.

Rule discharged.

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Friday,
July 2d.

GOODRIGHT, on the several Demises of J. REVELL,
S. REVELL, R. COCK, and of J. STEELE, *against*
MARY PARKER and Others.

Devise of testator's leasehold houses, held for a term renewable, to J. T. S. to his own use and benefit on his attaining 21, upon trust that his (the testator's) trustees should pay and perform rents, and covenants, and renew the same from time to time, and for that purpose to make surrender, &c., and also to permit the trustees to receive the rents during the minority, the maintenance of the infant to be paid thereout, with liberty to M. P. to keep the houses during the minority paying rent to the trustees, &c.: Held that this was in effect a devise to the trustees during the minority, with a vested remainder to J. T. S. the infant; and that the interest of M. P. ceased on the death of J. T. S. before 21.

EJECTMENT, tried at the last summer assizes for the county of *Devon*, before *Chambre J.* Verdict for the plaintiff upon the demise of *J. Steele*, subject to the opinion of the Court upon the following case:

William Rowe, being possessed of five houses and tenements in *East Stonehouse*, held by him for the residue of certain terms for 99 years determinable on three lives respectively, with a covenant from the lessor to renew on their deaths at a fine certain, by his will dated the 5th of *September 1810*, devised, "Item, I give and bequeath to *John Thomas Steele*, son of *John Steele* (the lessor of plaintiff) all those five messuages or dwelling-houses, &c. to and for his own use and benefit on his attaining his age of 21 years, upon trust that they my trustees hereinafter named shall pay and perform the rents and covenants on the lessees part and behalf to be performed, and to renew the same from time to time as occasion shall require, and for that purpose to make such surrender of the lease so to be renewed as shall be requisite and necessary in that behalf, and out of the rents, issues, and profits of the said premises to raise such money as shall be sufficient for paying the several fines and other necessary charges of renewing the said lease from time to time, and subject thereunto, and also to permit and suffer my trustees to receive the rents and profits of the said several

houses during the minority of the said *J. T. Steele*, and the maintenance and support of the said *J. T. Steele* during his minority to be taken and paid out of the rents and profits of the said houses." And after making several bequests to *Mary Parker* (the defendant) he directed, "And if the said *M. Parker* should wish to keep the five messuages or dwelling-houses and premises, with the appurtenants, as lodging-houses, at the rate of 80*l.* per annum, and pay and discharge all rates, taxes, and impositions, and also to keep the premises in good repair during the minority of the said *J. T. Steele*, she may be at liberty so to do by paying the said rent to the said trustees hereinafter named, and also by paying the said taxes, or otherwise she is to deliver up the several premises to my said trustees within three months after my decease." The testator then gave to his trustees several other houses, with the appurtenants, to be sold for the payment of all his just debts, &c. and appointed *J. Revell*, and *S. Revell*, (two of the lessors of the plaintiff) trustees of his will, and *M. Parker*, his sole executrix. The testator died so possessed as aforesaid, without having altered or revoked his will, and the defendant *M. Parker*, proved the same, and took possession of the premises in question, and still holds part thereof, the other defendants being in the possession of the remainder, and claiming under her. *M. Parker* assented to the bequests in the will, and in *January* 1811 *J. T. Steele* died an infant, and would not have attained the age of 21 if he had been still living, and in the *April* following his father *J. Steele* (one of the lessors of the plaintiff) obtained letters of administration of his personal estate and effects, and is at present his personal representative.

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The questions for the opinion of the Court are, whether in the events that have happened the said *J. Steele*, or the said *J. Revell* and *S. Revell*, in trust for his use and benefit, is or are entitled to the premises in question; if the opinion of the Court shall be in the affirmative, the judgment is to stand, if otherwise, a nonsuit is to be entered.

Bayly, for the plaintiff, contended that under this devise the whole of the testator's interest passed to the infant, and nothing but a bare power was given to the trustees; and he cited several authorities (*a*) to shew that a man may give a power to a stranger, which is naked and collateral, and not annexed to any estate. But if it should be deemed necessary, for effectuating these trusts, that the trustees should take the legal estate, in that case he said it was a devise to them till the infant attained 21, remainder to the infant; which remainder vested in him immediately, without waiting for his attaining that age; and in support of this he cited *Boraston's case* (*b*), *Goodtitle v. Whitby* (*c*), *Doe v. Lea* (*d*). And this was a stronger case for holding that the party took a vested remainder than the cases cited, because in those cases there was an express devise to the trustees before the devise to the infant, whereas here the whole is given in the first instance to the infant, and the estate of the trustees is by implication only. As to the interest of *M. Parker*, (the defendant) he contended that it determined on the decease of the infant. This was not a

(*a*) *Bro. Abr. Testament*, pl. 22. *Com. Dig. tit. Pojar A. 1. 2 Vent. 350. Sayle v. Freeland.*

(*b*) 3 *Rep.* 19. a.

(*c*) 1 *Burr.* 228.

(*d*) 3 *T. R.* 41.

devise to the trustees of such a nature as must be intended to give them an estate for so long a time as the infant, if he had lived, would have attained the age of 21; and *M. Parker* was to pay rent to the trustees during the time she was to be permitted to keep the houses; consequently her interest was not to continue longer than that of the trustees. Upon this point he cited *Lomax v. Holmeden*. (a)

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Caslee contra, admitted that the remainder vested in the infant upon the testator's death, but took this distinction, that in the cases cited there were words of inheritance, whereas here the devise is to the infant, without any words of inheritance; and therefore, though it might vest in him immediately, it would not take effect on his death, until the time when he would have attained 21. At all events the title of *M. Parker* was not to be defeated until that period.

LORD ELLENBOROUGH C. J. said that here the trustees were not only to pay rents and perform covenants, but to renew from time to time and for that purpose to surrender, which did not well accord with the argument of their having a mere power only. But on the other points his Lordship, after referring to *Hanson v. Graham* (b) in which most of the cases were considered, said that the present devise was in effect a devise to the trustees till *J. T. Steele* attained the age of 21, remainder to *J. T. Steele*, in which case the remainder vests presently; and if it vests for one purpose, it does so for all. As to

(a) 3 P. Wms. 175.

(b) 6 Ves. 239.

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the title of *M. Parker*, she was to pay rent to the trustees, and of course her interest could not be intended to last beyond the time she was to pay rent.

Per Curiam,

Judgment for the plaintiff.

Saturday,
July 3d.

SIMPSON against HANLEY and Another.

The defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in this court on his acknowledging satisfaction for the amount upon a judgment obtained by him in *C.P.* against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment.

THE defendant *Hanley* had obtained judgment against the plaintiff in the Common Pleas for 60*l.* debt, and 26*l.* 6*s.* costs, and had taken him in execution under a writ wrongly issued out of this court, upon which the plaintiff brought an action in this court for false imprisonment, and recovered against the defendant 50*l.* damages, and 19*l.* 10*s.* costs. Afterwards the defendant took the plaintiff in execution by a proper writ issued out of the common pleas, and the plaintiff being still in custody under that writ, a rule nisi was obtained for the defendant, why upon his (the defendant's) acknowledging satisfaction for 69*l.* 10*s.*, in the cause in the Common Pleas he should not be at liberty to enter satisfaction upon the judgment roll in this court.

Marryat shewed cause, and contended that the plaintiff by remaining in execution upon the judgment against him in *C.P.* was discharged by law from that judgment, having made satisfaction.

HEATH, in support of the rule, relied on *Peacock v. Jeffery*. (a)

(a) 1 T. 426.

DAMPIER J. (the only Judge in court) said that the case cited was precisely in point, and therefore he considered himself bound by it, and made the

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Rule absolute.

The KING *against* The Mayor, Burgeffes, and Commonalty of CARMARTHEN.

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MANDAMUS. The writ recited that by letters patent (27 *July*, 1764,) the borough of *Carmarthen* was incorporated, and that it was ordained that no person should be a burgeffs except such person as for three years previously to his application to become a burgeffs, had been seised of a freehold for life, or some greater estate, of the yearly value of 4*l.*, or seised of land which had come to him by descent, or marriage, or who had been an apprentice for seven years with a burgeffs, so as such person did make application for that purpose to the mayor and commonalty of the borough on *Monday* next after *Michaelmas* in each year, and at no other time, and so as such person did then before the said mayor and commonalty make due and legal proof of his qualification, and that upon such proof such person should be admitted a burgeffs at the next, or any subsequent fortnight court, to be holden in and for the

Where a charter of incorporation after ordaining who should be entitled to be burgeffes, directed that they should make application for that purpose to the mayor and commonalty on a day certain in each year, and at no other time, and then make due and legal proof of their qualifications, and *A.* and *B.* claiming to be admitted burgeffes, made application to the mayor and commonalty on the charter day, and offered to make due and legal proof of their qualifications, but their applications were not heard, nor their proofs received, on account of the time having been spent in other business; the Court granted a mandamus to the mayor and commonalty to enter an adjournment to a subsequent day, and then to hold a meeting, and receive and examine such proofs, &c.: and a return to such mandamus that it was impossible for *A.* and *B.*, before the expiration of the charter day, to make due and legal proof, &c., according to the intent of the charter, by reason of the day being consumed in the necessary business of the borough, and that the mayor and commonalty were not authorized to hear such proof on any other than the charter day, &c., was held ill and quashed.

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said borough, after such day on which he should make his claim: and also recited that on *Monday* next after *Michaelmas* then last past, the mayor and commonalty had assembled, in order to transact the business of the borough, and (inter alia) to receive the applications of persons claiming to be entitled to their admissions as burghesses, and to hear and examine the proofs made by such persons, and that *Thomas Davies* and others, claiming to be admitted as burghesses, made application for that purpose, and offered to make due and legal proof of their qualifications, but by reason of the time spent by the mayor and commonalty in other business, their applications were not then heard, nor was their proof received, whereupon it became the duty of the mayor and commonalty to adjourn the meeting to some other convenient day, for the purpose of receiving such proof, and hearing and determining such applications, and to cause such adjournment to be duly entered on the records of the borough; yet that the mayor and commonalty not regarding their duty, omitted so to do. The writ then commanded the mayor and commonalty to enter an adjournment to some subsequent convenient day, and on that day to hold a meeting and receive and examine the proof offered by *Davies* and the other applicants; and to hear and determine the matter of such applications.

The corporation returned, that by reason of the whole of the day being consumed in the necessary business of the borough, and in hearing and investigating the proofs of the persons claiming their admissions as burghesses, it became and was impossible for *Davies* and the other persons, before the expiration of that day, to make due and legal proof of their qualifications, according to the true intent and meaning of the letters patent:
and

and they farther returned, that by the letters patent no person can be lawfully admitted and sworn a burges of the borough, unless such person shall make application on *Monday* next after *Michaelmas*, and at no other time, and then and there make due and legal proof of his qualification : and that the mayor and commonalty are not by the letters patent authorized to hear such proof on any other day than the day last aforesaid, nor to make any adjournment from that day to any other day, for that purpose ; nor is any person entitled to be admitted a burges, whose qualification shall be proved at any other time save and except the *Monday* after *Michaelmas*, which day is the day exclusively appointed for that purpose by the said letters patent ; and for these reasons they submitted that the mayor and commonalty cannot enter, or cause to be entered, on the records of the said borough, an adjournment of the said meeting or assembly so holden on the *Monday* next after *Michaelmas* last past, to any subsequent day, nor at any subsequent day hear and examine the proofs which may be offered by the said *T. Davies*, and the said other persons whose applications to be admitted as aforesaid, were made upon the said *Monday* last mentioned, and not then heard.

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Abbott, for the prosecutors, submitted that as the return did not deny the qualifications of the prosecutors, the only question was whether upon the construction of this charter, if the whole of the charter-day be occupied in the business of the charter, without the means of bringing it to a conclusion, the corporation has power to adjourn to another day, or whether the parties making their claims must wait until another year. He insisted

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upon the great practical inconvenience that would result from the latter construction, and put the present as an instance, where there were upwards of fifty claimants unheard; and therefore if such a construction should prevail, it was probable that the hearing of some of them must be deferred from year to year to a great distance of time. By analogy to proceedings of a similar description, it should seem that the mayor and commonalty had an incidental power of adjournment in this case; if an election is appointed by charter to take place on a particular day, it was never heard of as an objection to such election, that the poll was adjourned to the next day. Perhaps the strongest instance that can be put is that of a trial for felony or treason, upon which the law is, that if a jury be sworn, they shall not be discharged until they have given in their verdict (*a*); and yet in cases of necessity it is held that they may be adjourned.

Scarlett, contra, denied that the instances put were parallel, because there was not any law which limited the trial of a cause either criminal or civil to the space of a day; and he said that this was more like the case of the law terms, which being fixed by several acts of parliament (*b*), the Courts cannot adjourn them, but however important the business then pending may be, they must of necessity terminate with the last hour of the last day. Here the words of the charter are precise; "no person shall be a burgess, except &c., and so as he make application on the charter day, and at no other time, and then

(*a*) *Co. Lit.* 227. *b.* 3 *Inst.* 110.

(*b*) 32 *H. 8. c.* 21. 16 *Car. 1. c.* 6. 24 *G. 2. c.* 48.

make due and legal proof," &c.: surely the same words which require the application require also the proof to be made on the charter-day. And there might be good reason originally for so requiring, for without some such limitation the corporate body would become too numerous; and therefore it was probably intended to restrain the annual admissions to such a number as could be admitted within the space of a day. To hold that wherever a statute or charter prescribes an act to be done on a day certain, it gives, as incident, a power to adjourn the doing it to another day, if it cannot be done on the day prescribed, would certainly be a decision of very extensive consequence; and therefore it requires some express authority to warrant it. It would lead to nice and very precarious distinctions in corporate titles if they were to depend upon questions whether their admission was at a meeting properly adjourned, or whether it sat long enough, or was occupied with necessary business, or used proper expedition on the charter-day. The case put, of adjourning a poll, is not in point, because there the election is commenced on the charter-day, and the poll afterwards is only a continuance of the same proceeding, and so the Court may well refer the whole back to the first day; but here each application is, like a new cause, distinct from the other, and not one continuing proceeding. This falls within that class of cases (*a*) which happened before the stat. 11 G. 1. c. 4., where, upon an omission to elect a mayor or chief officer on the charter-day, it was resolved that this Court could not grant a mandamus to elect at another day.

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(*a*) 10 Mod. 346. *The Case of Corporation of Banbury*. 8 Mod. 111. 127.
Rex v. Mayor of Tregony. 3 T. R. 221.

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LE BLANC J. (a) There is no doubt that a peremptory mandamus ought to go. The provisions of the charter are to enable persons having a previous inchoate right to perfect that right by being admitted. Therefore the charter prescribes a particular day for making the application; it directs that such persons as are entitled under the charter shall be admitted to their freedom, so as they make application for that purpose to the mayor and commonalty on *Monday* next after *Michaelmas* in each year. So far the charter limits the time for making application to a particular day, and it adds at no other time. Then it goes on, “and so as such person do then before the said mayor and commonalty make legal proof of his qualification,” and it proceeds, “and that on such proof such person shall be admitted a burgess at the next or any subsequent fortnight court.” The making the claim cannot occupy much time, but the examination of the evidence in order to substantiate the claim either of a person claiming in respect of his property, or as an apprentice, may possibly run to a considerable length. The claim is restricted to a particular day; but the words of the charter do not confine the substantiating such claim to the particular day; “then and there make legal proof” does not in its grammatical sense or by any rule of construction, and certainly there is no reason why we should so construe it, import that if the length of day be not sufficient to enable them to make good their titles, that they should be precluded altogether, and so be delayed till the next year, or to an indefinite period. As to the inconvenience arising from the other construction, I am not aware that it is likely to be great. It is sug-

(a) Lord Ellenborough C. J. was absent.

gested that it might enable the corporate body to adjourn too soon; but if the Court saw that any improper use was made of their power of adjournment, we might correct it. On the other hand, if we deny the power of adjournment, the probable inconvenience would be greater, for some one business might easily be protracted till 12 at night, to the exclusion of all the other business, which must in that case necessarily go over to the next year. The case of an election of a mayor before the statute where the charter-day was suffered to elapse, does not apply; and not any case has been cited where an election was commenced on the charter-day, but not concluded. The cases are, either where an assembly for the election of a mayor was not holden at all, or where having been holden, the election was colorable. In both those cases the assembly could not be holden after the day, because there had not been any commencement of a due election on the day. In this case it appears that from unavoidable necessity the whole day had been exhausted, not before the claims were made, but before the evidence in support of them could be heard. Common sense shews that the charter must have meant that the corporate body should have power to adjourn in order to conclude such business as they had regularly begun, otherwise it would be in the power of any person by contrivance to protract the business and prevent the claims being effectual. Upon these grounds it strikes me that a peremptory mandamus ought to go.

BAYLEY J. I am of the same opinion. If the assembly had no power to adjourn and proceed at another time, still I should think this return would be bad; because in that case it ought to have stated that the corporate body met

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met at the earliest period of the day, and to have accounted for every moment of the day, and that they did no other than necessary business, such as was required to be done on that day; and therefore on that ground alone it would be bad: but I have no difficulty in saying that the corporation must of necessity have the power of adjournment, in order to conclude such business as they began, and had not time to finish on the charter-day. The business to be done is to fill up vacancies in the corporation, and to receive the claims and hear the proofs of such persons as claim. That is the general business of the day; which, I take it, constitutes one entire business, as much as the election of a mayor. There is much fallacy in the argument which attempts to distinguish this from the election of a mayor, as if each man's claim was an individual act and distinct, whereas the general business of the day is all such claims as may be made. Great injustice might follow from considering them as distinct and giving priority to any. If there was any improper bias in the persons present, it might be contrived so as not to be able to get through a single claim during the day; those might be put forward whose claims were most likely to run to the greatest length of time. Even without any improper bias in any one, questions might arise in the fair exercise of this franchise which would naturally occupy much time, such for instance, as whether the claimant was seised of his freehold, or whether he was in by descent, and other questions of the like nature which might thus occupy the whole day. It seems to me therefore that the true construction of the charter is, that the claim must be entered on the charter-day, and that the claimant must be then prepared with his proofs, and that the assembly must hear them through, provided there be time

time on the charter-day; but if not, by adjournment *de die in diem* until all the claims are disposed of. That will produce no injustice, afford no opportunity of giving preference to one over another, and raise no bias in persons in different interests, to waste the time by protracting the claims of any. It seems to me therefore that this right of adjournment is necessary, and consequently incident.

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DAMPIER J. Supposing the construction of the charter to be such as contended for in support of this return, still the return would be bad; because it ought to have shewn to the Court what other necessary business occupied the whole of the day, instead of being stated generally that the whole day was consumed in necessary business: what they call necessary might not, if strictly examined, turn out to be necessary on that day; and if so, it ought to have been adjourned in favour of that business which was necessary. They have returned, that by reason of the whole of the day being consumed in the necessary business of the borough, and hearing proofs of some of the claims, they were unable to proceed in the rest. Non constat but that they may have taken any business of the corporation necessary to be done on some day or other, but not on that day, and have returned that it was necessary; but the Court ought to see that it was necessary, and such as could only be performed on that day. But upon the construction of this charter, I cannot bring myself to think that the construction which has been contended for in support of the return is the correct one. I think that the charter requires that the claims should be entered on the charter-day; but that it is not necessary that they should be investigated, or even begun

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begun to be investigated on that day, if the time will not allow it. The meaning of the thing required is, that the corporation should have notice of the claims, and that the parties making them should be prepared with their proofs in support of them. The argument on the other side would go to shew, that if the corporation wrongfully refused the claims, those claims must be suspended until another year: that this case is like the case of no election, or of a colourable election prior to the statute. But that is pushing the argument much too far. It seems to me, from the very nature of this case, to be absolutely necessary that the corporate body should have the power of adjournment, in order to give effect to the inchoate rights of the claimants, and to guard against the possibility of their claims being frustrated by any contrivance. Therefore I am of opinion, a peremptory mandamus ought to go.

Return quashed.

Saturday,
July 31.

LEVERIDGE *against* FORTY and Another.

Where defendants gave a warrant of attorney to secure a sum certain, to be paid half-yearly by instalments, with interest, on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, but no

execution to be issued till default made in payment of the said sum, with interest as aforesaid, by the instalments, and in the manner hereinbefore mentioned: Held that the plaintiff might take out execution for the whole on default in payment of the *first* instalment.

THE defendants had purchased the business and stock in trade of the plaintiff, for which they had given him a warrant of attorney in the sum of 2805*l.* for securing the payment of 1402*l.* 18*s.* 8*d.*, with interest, to be paid half-yearly, by instalments of 150*l.*, with interest from the date of the warrant of attorney; the first instalment to be paid on the 24th of *June* 1813, and the rest on the 25th of *December* and 24th of *June* successively

till the whole sum of 1402*l.* 18*s.* 8*d.*, with interest, should be satisfied; and that the plaintiff should be at liberty to enter up judgment thereon immediately, with this defeasance, "but no execution to be issued until default made in payment of the said sum of 1402*l.* 18*s.* 8*d.* with interest as aforesaid by the instalments and in the manner hereinbefore mentioned."

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—
J. EVERIDGE
against
FORTY.

Upon the first instalment becoming due payment of it was demanded and refused, whereupon the plaintiff entered up judgment, and took out execution for the whole. A rule having been obtained for setting aside that execution, *Andrews* shewed cause, and contended that on the first default the plaintiff was at liberty to take out execution for the whole; and *Topping* and *Curwood*, contra, observed on the form of this defeasance, which they said would have been in the usual form, not to take out execution until default in payment of the first instalment, if it had been intended only to restrain the execution until that time; and they insisted that at all events the plaintiff was only entitled to execution to the amount of the first instalment.

LE BLANC J. (a) said this was a question of construction on the terms of the defeasance. This was a security given by a warrant of attorney. If the warrant of attorney had been without any defeasance, of course the party would be entitled, on the first default, to his execution immediately; but the defeasance is that "no execution is to be issued until default in payment of the said sum by the instalments and in the manner before mentioned;" that is, in the manner prescribed by

(a) Lord *Ellenborough* was absent.

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the warrant of attorney. Then by default in payment of the first instalment on the 24th of *June*, the party had failed in payment in the manner prescribed by the warrant of attorney, and so, according to the words of the defeasance, "in the manner before mentioned." If the party had meant to provide against execution being taken out for the whole before the whole was due, he should have done so in express terms; but the only restraint on the plaintiff from taking out execution is "until default made in payment of the said sum by the instalments," and default is made by non-payment of the first instalment. I doubt whether the party would be at liberty to take out another execution, though I do not proceed on that ground.

BAYLEY J. I am of the same opinion. The probable intention of the parties was that if any default was made, the plaintiff should be at liberty to levy the whole. There is not any provision for levying from time to time as default should be made.

DAMPIER J. The defeasance is "that the plaintiff shall not be at liberty to issue execution until default made in payment of the said sum by the instalments, and in the manner before mentioned;" and this case falls within the literal construction of these words; for default has been made in payment by the instalments, by non-payment of one instalment. It seems to me that this is a case where the intention of the parties, as it is to be collected from the instrument, was probably their real intention; for the warrant of attorney was given for the good-will of the plaintiff's trade; and therefore the plaintiff might be well content as long as the trade was thriving, and the instalments

were regularly paid, to take payment in that mode; but if there was any fear of insolvency, he would come for the whole at once. I doubt much if in point of law the party could take out a second execution.

Rule discharged.

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against
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HARTOP *against* JUCKES, Gent. one, &c.

Saturday,
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MARRYAT obtained a rule nisi on behalf of the defendant for setting aside the proceedings in this cause for irregularity. The affidavit of the defendant stated that on the 10th of *June* instant he was served with a copy of a bill filed against him at the suit of the plaintiff, partly printed and partly written, on one large sheet of paper, with one duty of 4*d.* stamped thereon, which, upon comparing with the original bill, was found to correspond with it both in printing and writing. The beginning and prayer of the bill and copy were in writing and figures; two of the printed counts were struck out with a pen; the blanks originally left in the six remaining printed counts and the breach were filled up with writing, and many parts were also struck out with a pen. The affidavit went on to negative its being the practice to make such original or copy of a bill, or to insert so many folios in any copy of a bill or declaration delivered in any cause on one duty only; that the number of words and figures in this copy exceeded 17 common law folios.

The rule was opposed on an affidavit of the plaintiff's attorney, which stated that the bill filed contained the usual and accustomed duty, and that the practice was

A copy of a bill filed against an attorney, partly printed and partly written, on one sheet of paper, stamped with a 4*d.* stamp, which contained several printed counts, with two of them struck out, and was otherwise obliterated, and exceeded 17 common law folios, was held to be irregular, as not being a copy written in the usual and accustomed manner, on which the duty of 4*d.* per sheet is imposed by stat. 48 G. 3. c. 149. sched. 2. And it appearing that the bill was framed in the same manner, with the same obliterations, the Court also set that aside as being contrary to the practice of the court.

not

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not to ingross a bill of this or greater length on more than one duty, and that there was no instance of using two skins or duties for ingrossing a bill under 30 folios; that the most common length of declarations in debt was 18 folios, or thereabouts, which the deponent had usually ingrossed in one sheet, and on one duty, before the passing the last stamp act and since.

Campbell, who shewed cause on a former day, first took an objection to this application as coming too late, being made after judgment had been signed as for want of a plea, and writ of inquiry issued, and notice thereof given for this day, and the witnesses subpoenaed. He then referred to 48 G. 3. c. 149. sched. 2. which imposes a duty of 4*d.* upon a copy of any declaration, &c. in any court of law, and relied upon the affidavit of the plaintiff's attorney, that one duty was the usual duty for a bill of that or of greater length.

The Attorney-General, on the part of the stamp-office, insisted that however the objection of lateness might apply to the defendant, it did not affect the stamp-office, who could not have any notice of the proceedings until communicated to them by the parties: and he further insisted that the stamp was irregular, because the paper in respect of which it was paid was not written or printed as the act requires, "in such and in the same manner and form as the like matters or things have been heretofore accustomed to be or are now usually written or printed."

Lord ELLENBOROUGH C. J. observed that it was to be lamented as a consequence of the statute for render-

ing the proceedings at law into *English* (a), that the literature of the inferior part of the profession had receded since that time; and he added, that the introduction of printed forms was, he believed, of but modern practice.

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The Court adjourned the case in order to have an opportunity of inspecting the bill and copy. And now having inspected them, the Court animadverted on the manner in which they were framed, the greater part of the counts being printed, some of the common counts struck out, and otherwise obliterated, and said that they would not permit their records to be so defaced; and that the justice of the case would be attained by making the

Rule absolute (b).

(a) 4 G. 2. c. 26.

(b) See *Champneys v. Hamlin*, 12 East, 294.BLADES and Another *against* ARUNDALE.

Monday,
July 5th.

TRESPASS for taking goods on 1st *January* 1813.

Plea not guilty. At the trial before Lord *Ellenborough* C. J., at the *Middlesex* sittings after *Easter* term, it appeared that on the 24th of *October* last a writ of fi. fa., at the suit of one *Leach*, returnable on the morrow of *All Souls*, was delivered to the plaintiffs, (sheriff of *Middlesex*,) against the goods of one *Wood*, indorsed to levy 87*l.* 1*s.*, besides poundage, &c., on which day the plain-

Where a sheriff's officer executed a writ of fi. fa. by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table and saying, "I take this table," and then locked up his warrant

in the table drawer, took the key, and went away, without leaving any person in possession, and after the fi. fa. was returnable, but not continued, the landlord distrained the goods for rent: Held that the sheriff could not maintain trespass against him.

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tiffs made their warrant to an officer, who went to *Wood's* lodgings, and informed him that he came to levy on his goods, but made no manual or actual seizure except laying his hand on a table and saying "I take this table," and then locked up the warrant in the table-drawer, took the key, and went away, without leaving any person in possession. The house belonged to one *Lipscombe*, who resided in it, and had let part to *Wood*, and *Lipscombe* was tenant of the whole house to the defendant; and had paid him at *Christmas* all the rent up to that time, except 8*l.*, for which sum the defendant, on the 4th of *January* 1813, distrained and sold the goods in question, which were part of the goods so permitted by the sheriff's officer to remain in *Wood's* apartment. It did not appear, that the writ of execution had been continued. It was objected, for the defendant, that the plaintiffs had no right to take the goods in execution without having first satisfied the defendant for the arrears of rent under the 8 *Ann. c. 14.*, and therefore they could not maintain this action; to which it was answered, that the defendant was not within the description of landlord intended by the statute, not being the immediate landlord; and supposing he was, that he had given no notice to the sheriff. His Lordship directed a nonsuit. Whereupon, on a former day in this term, *Holt* obtained a rule nisi for setting it aside, and he cited *Bennet's case (a)*, and *Waring v. Dewberry (b)*.

Park and *E. Lawes* now shewed cause, and did not insist on the objection made at the trial; because, admitting the seizure made by the sheriff to have been

(a) 2 *Stra.* 787.(b) 1 *Stra.* 97.

good, at the time, still, after the writ had been suffered to expire, and no person was left in possession, the sheriff must be taken to have abandoned the execution, and the goods could no longer be considered as remaining in the custody of the law. Consequently, at the time when the defendant distrained, the execution could not operate to make the distress invalid: and they cited *Parflow v. Cripps* (a).

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The Attorney-General and *Holt*, contra, contended that as it was admitted that the sheriff had once made a good seizure, he must be considered as constructively in possession at the time of the distress. Although the sheriff, if he continued in possession after the return of the writ against the consent of *Wood*, might be liable to an action at the suit of *Wood*, yet *Wood's* consent to his continuing will make his possession lawful; and it is a frequent practice, instead of renewing the writ, to allow the sheriff to continue; and he may sell after the return of the writ (b).

LORD ELLENBOROUGH C. J. Admitting that the sheriff might have continued in possession after the return of the writ, the question here is whether by quitting the premises after the seizure, and leaving no one in charge of the goods, he did not relinquish the possession. If he did, I am not aware of any case, where, upon an abandonment of the possession by the sheriff, the goods have still been holden to remain in the custody of the law, so as to make the party distraining them a trespasser. In this case, what is there to shew a continuance of the possession after the officer who

(a) *Com. Rep.* 204.(b) *Jeanes v. Wilkins*, 1 *Ves.* 195.

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made the seizure withdrew? The locking up the writ in the drawer certainly cannot amount to it: therefore the possession, as soon as the sheriff abandoned it, reverted back to the original owner.

LE BLANC J. I think this case may be determined on the single point, that the sheriff was not in possession at the time of the distress.

BAYLEY J. It is not possible to convert the landlord into a trespasser through the medium of a writ locked up in a drawer.

Per Curiam (a),

Rule discharged.

(a) *Dampier* J. was absent.

Monday,
July 5th.

RANDOLL *against* BELL and Another.

Where the holder of a bill of exchange, who held it in trust for plaintiff, sued the drawer, and, pending that suit, became bankrupt, and his assignees afterwards brought an action against the drawer in the bankrupt's name, in which action, the sheriff having been

ACTION for money had and received, to which the defendants pleaded the general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term it appeared, that the plaintiff, who was indebted to one *Allder* in the course of trade, gave him a bill of exchange in payment, which exceeded the amount of his debt by about 140*l.*, but was payable at a distant day, and soon afterwards put into his hands another bill, drawn by *Dufresne*, and accepted by *Murray*, for 384*l.* 9*s.*, without indorsing it, and re-

guilty of an escape on mesne process, the assignees recovered against the sheriff in an action for the escape, damages to the amount of the bill: Held that the plaintiff might maintain money had and received against the assignees for the damages so recovered, allowing to them the costs and expences. Dissentient Lord *Ellenborough* C. J.

quested

quested him to give him his acceptance for the amount of that, and of the balance due on the first bill. *Allder* refused to give his acceptance for the whole, but accepted for 315*l.* 10*s.* 6*d.* When the bill upon *Murray* became due it was dishonored, and *Allder* commenced actions against both *Dufresne* and *Murray*, and afterwards became bankrupt, and a commission issued against him, under which the defendants were chosen assignees. The defendants afterwards brought an action in his name against *Dufresne*; in which action bail having been put in in a wrong county, the defendants thereupon sued the sheriff for an escape; the sheriff suffered judgment by default, and upon a writ of enquiry the jury gave a verdict for the amount of the bill of exchange on which *Dufresne* had been arrested. There was some evidence given to shew that the attorney for the defendants, whilst their action was going on against the sheriff, had in a conversation with the plaintiff agreed that they should be accountable to him for the amount of the bill, if they recovered in the action. It was not disputed that if the money recovered against the sheriff could be considered as the produce of the bill, the plaintiff would be entitled to recover; but the question under these circumstances was, whether it could be so considered. His Lordship ruled, that the action against the sheriff being for a tort, the money recovered in it by the defendants could not be considered as money recovered on the bill, and so was not money had and received to the use of the plaintiff, and therefore he directed a nonsuit. A rule having been obtained on a former day in this term for setting aside the nonsuit,

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Park and *Richardson* now shewed cause. They observed that the action against the sheriff was for an escape on mesne process, in which the jury were not bound, as upon an escape out of execution, to give damages to the full amount of the debt. That is the distinction between actions for an escape on mesne process, or an escape in execution: and the plaintiff is not prejudiced by not being allowed to recover in this action, for he has his remedy, 1st, by trover against the defendants if they withhold the bill, and afterwards by action on the bill itself; and this recovery against the sheriff could not be pleaded in bar to such action. If it should be asked whether the assignees, after having recovered the amount of the bill against the sheriff for the tort, might still recover against *Dufresne*; it may be answered that it seems they might, because the former recovery for the default of the sheriff was collateral to the debt, and entirely matter of damages. In *Bonafous v. Walker* (a) Buller J. said, that “at common law an action on the case only, lay against the sheriff or gaoler for an escape, in which case the creditor might recover *damages* for the officer’s *misconduct*; but still he had a right to recover the debt against the original debtor. But the statutes gave an action of debt against the sheriff or gaoler to recover at once the sum for which the prisoner was charged *in execution*.” Now, this being an action for an escape from mesne process, the statutes do not apply: it is only an action at common law, and the damages given are for the misconduct of the officer, and not in satisfaction of the debt; and therefore they cannot be considered as money had and received to the use of the plaintiff. It is

(a) 2 T. R. 129.

a compensation to the assignees for the injury sustained by them, not by the plaintiff, between whom there is not any privity; and the assignees are accountable for the amount to the whole body of creditors. It is true that the assignees, according to *Alexander v. Macauley* (a), were bound to shew that something was due upon the bill, but still the debt due on the bill was not the cause of action, but the injury arising to them from the delay occasioned by the escape. As to the conversation of the defendants' attorney, supposing it amounted to an agreement, it was not such an agreement as was within the scope of his authority to make, and therefore will not vary the question.

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The Attorney-General and *Marryat*, contra, said, that the action for money had and received was an equitable action; that as it was not denied that the plaintiff might have brought trover against the defendants for this bill, if they had withholden it, so now when they have received the fruits of the bill it cannot be denied that he is at liberty to waive the tort, and instead of trover, to sue for money had and received. If the plaintiff cannot recover in this form of action, the consequence will be that the defendants will be enabled to retain in their hands a large sum of money, to which they have no claim or color of right. The bankrupt held this bill as trustee for the plaintiff, and if he had recovered upon it, he would have been compellable in equity to account with the plaintiff. Suppose the money had been paid into the bankrupt's hands for the honour of *Dufresne*, could he have retained it? If not, what difference does it make

(a) 4 T. R. 611.

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in point of law, that instead of being paid for the honour of *Dufresne* it was paid by the sheriff? *Kitchin v. Campbell* (a) shews, that wherever a party receives the produce of property belonging to another, the law supposes him to have received it for the use of the person whose property it is, and that he may waive the tort and bring money had and received for it. And by the same case it appears that a recovery against the defendants in this action, will be a bar to any future action by the plaintiff on the same bill. There are many instances where payment by another is held to be equivalent to payment by the party himself, as payment by the bail, or by a sheriff to relieve himself from an attachment. Here the damages recovered were the fruits of the bill, which bill, it is admitted, belonged to the plaintiff.

Lord ELLENBOROUGH C. J. After the fullest consideration of this case, I confess that I still retain my original opinion, that the sum of money which the assignees of *Allder* have recovered in the action of tort against the sheriff, is not a sum to which the plaintiff *Randoll* is privy, so as to be in a situation to maintain an action at law, to recover it from the assignees. It is true that this court is much in the habit of exercising a very useful jurisdiction by staying proceedings in cases where the money has been paid over by the bail; and that is done upon application to the equitable jurisdiction of the court. But I cannot help thinking that there is great convenience in maintaining the simplicity of suits. If the money recovered by the assignees against

(a) 3 *Wils.* 304.

the sheriff, which was recovered against him for his delinquency in an action brought by them on this bill, which bill was deposited with the bankrupt, before his bankruptcy, and afterwards came into their hands, is money had and received to the use of the plaintiff, then if the bill had been taken by force from the person in whose hands it was deposited, and he had brought trespass for it, and recovered against the trespasser damages combining the personal injury and the loss of property, I am not prepared to say that such damages might not also be money had and received to the plaintiff's use. But it may be said the two cases are not alike, because here the damages were limited by the amount of the bill: but that I deny, for here the jury, if they thought that not the measure of damages, might also have given damages for the tort under all its circumstances and aggravations. I am at a loss then how to look into the minds of the jury, and to decompound their verdict, and pronounce how much they gave for loss or delay of remedy, and how much in payment of the bill. Without the means of determining this, I cannot see what damages can be said to be money recovered to the use of the person who deposited the bill, and more especially if, as it has been said, the party still has his remedy by trover or action on the bill. Neither do I think that the agreement of the defendants' attorney carries the case any further: an attorney may bind his client as to putting in bail and all the ordinary proceedings of a cause; but had he a right in this case to undertake for the defendants that they should be liable to pay over all the money they should recover, without being recouped any of their expences. It does not appear that any reservation of that sort was stipulated for,

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for, and therefore it was an agreement burthenfome to his clients. It may be faid that it is incident to fuch an agreement that they fhould be recouped, but I cannot infer that, when the whole extent of the agreement is ftated. It feems to me then that in a cafe where we cannot define how much damages were given for the delay and other collateral confequences, we cannot pronounce the defendants to be trustees for the plaintiff in the verdict which they recovered againft the fherriff, fo as to entitle him to this action. I do not mean to fay that in a court of equity they may not be compellable to pay over this money, but that will be after reimburfing themfelves all cofts and expences. At the fame time I would not be underftood to be defirous of abridging that ufeul form of action for money had and received in cafes where money is paid over for a third perfon, or where he is beneficially entitled to it ; but here, unlefs we could fcreen and filter the verdict, and appropriate fo much on account of damages, and fo much for the debt, I am afraid we cannot determine fpecifically to what amount the defendants are to be confidered as trustees who have received money to the ufe of the plaintiff.

LE BLANC J. It has not been difputed at the bar that if *Allder* or his affignees had recovered on the bill againft a party to the bill, the money might have been recovered from them, who had no right to the bill, by the plaintiff, who was entitled to it. In my view of this cafe, I think we may determine in favour of the plaintiff without breaking in upon any rule of law that has been adopted for maintaining diftinct the forms of actions. I think we are at liberty to confider the action againft the

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sheriff as a continuation of the original action, so as to give the plaintiff the fruit of it, especially where we cannot but observe that the damages given against the sheriff are the precise amount of the debt due to the original party. *Allder* and his assignees are the same, and could only recover against the sheriff by way of damages for the injury sustained by them from the delay caused in their obtaining the money due on the bill; but if the bill did not belong to them but to some one else, they are not really injured by the delay. With respect to their costs, I should think the plaintiff would not be entitled to recover in this action without making an allowance for them, because he must have incurred costs; but if we are to hold the forms of actions to be so strict, as to determine that the plaintiff is not entitled to this money, because the defendants recovered it from the sheriff in an action of tort, we shall be compelled to hold the same language where the money has been paid by the sheriff under an attachment, or to avoid an attachment: but could it be contended that an action for money had and received would not lie, because the money was paid to prevent an action of tort? There is great convenience in allowing the money to be recovered in this form of action, and in considering it as a payment in satisfaction, in order to avoid a multiplicity of suits. It may save an action of trover and other circuitous modes of action. The ground therefore of my decision is, that though this money was recovered from the sheriff in the shape of damages in an action for his misconduct, yet that was the means by which the defendants obtained the fruit of the original action, to which they were not entitled for their own benefit, but for the benefit of the plaintiff.

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plaintiff. I should therefore wish to have this case re-considered.

BAYLEY J. It seems to me that the plaintiff is entitled to recover. I disclaim all idea of confounding the distinction between courts of law and equity. A plaintiff here must undoubtedly succeed upon legal principles alone, and unless it appeared to me that this plaintiff could so succeed, I should be indisposed to permit the action. Here *Allder* held the bill as trustee for the plaintiff, and had no right to sue upon it, except as agent for the plaintiff; if the bill had been paid to him it would have been for the plaintiff's benefit, and *Allder's* assignees stood in the same situation. Under these circumstances they commence an action against *Dufresne*, in *Allder's* name; the sheriff is guilty of an escape in that action, which entitles them to another action against the sheriff. But on what ground were they so entitled? Not on the ground of being entitled in their own right; nor in right of *Allder* as principal, for no debt was due to him from *Dufresne* in that character; but the only ground of action was, their having been prevented from recovering what was due to the plaintiff. If the defendants had not shewn that something was due upon the bill, they would have been non-suited in their action against the sheriff. I agree that in that action the jury were not bound to give damages to the amount of the debt, but it has always struck me that they were warranted in doing so. I should have great difficulty in saying that *Allder* or his assignees could have recovered beyond the amount of the debt, with interest and costs, more especially where they only sued as trustees; for this is an action for satisfaction, not for vindictive damages.

damages. The sheriff is bound to put the party in the same situation in which he would have been had it not been for the escape ; and can that extend to more than the payment of debt and costs ? When I see therefore that the jury have given a sum greatly exceeding the costs, must I not attribute some part of it to the debt ? There is no colour for the assignees withholding the debt ; it could only be recovered as a debt lost to them, and it shall not be permitted to them afterwards to turn round and say that it is only damages for the delay in recovering the debt. It seems to me also that the recovery against the sheriff would be a bar to any future action in *Allder's* name against *Dufresne* upon the bill. Suppose then the plaintiff, instead of *Allder*, had recovered against the sheriff, and hereafter should bring an action upon the bill against *Dufresne*, would it not be a defence for him to state that the plaintiff had already received the whole amount from the sheriff ; I think it would. Then what difference does it make that here the action was by *Allder* and his assignees, *Dufresne* would still have an equal right to answer, that the whole amount of the bill had been received from the sheriff, by the assignees, as trustees for the plaintiff. I am of opinion therefore that without violating any rule of law the plaintiff may be permitted to maintain this action. I do not say that he is entitled to the whole sum which the defendants recovered from the sheriff, for I think they have a right to retain their expences in that suit ; but the plaintiff is entitled to the balance.

•*Per Curiam* (a),

Rule absolute.

(a) *Dampier J.* was absent.

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*Monday,
July 5th.*COHEN *against* ARMSTRONG.

Replication to a plea of infancy, that defendant, since the making of the promises, attained 21, and that before the exhibiting of the bill he ratified and confirmed the promises, is good after verdict, though it omit to allege that he ratified and confirmed after he came of age.

INDEBITATUS assumpsit for goods sold and delivered. Plea, infancy. Replication, though true it is that the defendant at the time of making the promises in the declaration was within the age of 21, as the defendant hath in his plea alleged, yet the plaintiff says, that the defendant hath since the making of the said promises attained the age of 21, and that *before the exhibiting of the bill* of the plaintiff, to wit, on the 1st of *January* 1813, at, &c., he the defendant assented to and then and there ratified and confirmed the said several promises, and each and every of them. Rejoinder, that the defendant did not assent to, ratify, or confirm the said several promises in manner and form as the plaintiff in his replication hath alleged. Verdict for the plaintiff. It was moved in arrest of judgment on an exception taken to the replication, because it only alleged that the defendant ratified the promises before the exhibiting the bill, but omitted to state that he ratified them after he came of age.

The Attorney-General and *Comyn* shewed cause, and contended that however good the exception might have been upon special demurrer, or after judgment by default, it was cured by verdict; and they cited *Wine v. Ware* (a), and 1 *Williams' Saund.* 228. n.; for after verdict it shall be intended that every thing was proved, which was necessary to make good the defective allegation, if it be

(a) 1 *Sidf.* 15.

defective; and therefore that it was proved, if it were necessary, that the defendant ratified after he was of age. But it seems from the case of *Borthwick v. Carruthers* (a) that if it had been so alleged in the replication, it would have been unnecessary to prove it; consequently it cannot be necessary to allege it.

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Park and *Reader*, contra, denied that *Borthwick v. Carruthers* was an authority to shew that the replication need not allege that the defendant ratified after he came of age, for there it did so allege; and as far as it was in point, they said it was against the intendment that the plaintiff proved at the trial that the defendant was of age, because there it was held not to be necessary.

LORD ELLENBOROUGH C. J. This form of replication that the defendant ratified and confirmed the promise, is not according to the old form: I remember it used to be formerly that he promised after he became of age. And, strictly speaking, that is the more correct form; for no person ever ratifies in words his former promise, but he makes a new promise. To say that he ratified is an artificial inference from the fact: it is not a ratification unless done *animo ratificandi*; whereas it is in general only a new promise to pay. I think however this replication may be supported. Ratification and confirmation mean something more than merely repeating the promise; and the jury have found that the defendant has ratified. What does that mean? It surely means that he rendered valid what was before done; and how could that be except by a valid act, which act would have

(a) 1 T. R. 648.

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been invalid, if he was then an infant. If the replication had alleged merely that he repeated the promise, it might have been different; but it alleges that he ratified; and I think that will do.

Per Curiam (a),

Rule discharged.

(a) *Dampier J.* was absent.

Tuesday,
July 6th.

JOHN BELL *against* REID.

BELL and Others *against* BULLER.

A natural-born subject of this country, domiciled in a foreign country in amity with this, may lawfully exercise the privileges of a subject of the country where he is domiciled to trade with another country in hostility with this; therefore where plaintiff, a British-born subject domiciled in America, effected a policy of assurance on ship, freight, and goods, at and from Virginia to any ports in the Baltic, and the ship was captured in her way to *Elfsneur*, in Denmark, Denmark being in amity with America, but at war with this country: Held that the plaintiff was entitled to recover.

THE first of these two actions was upon a policy of insurance, effected on the 13th of May 1810, by William and John Bell and Co. (which was described as the usual style and firm of the persons residing in Great Britain, who received the order for and effected the policy,) on the ship *Imogene*, valued at 4500*l.*, and on freight valued at 2850*l.*, at and from Virginia to her port or ports of discharge in the United Kingdom, or any port or ports, place or places, in the Baltic, &c. with leave (inter alia) to touch at all ports, places, and islands, for any purposes whatsoever, and sail to, and touch and stay at, any ports or places whatsoever, and to wait for information off any ports or places, &c. The interest was averred to be in the plaintiff John Bell, and the loss to be by hostile capture.

At the trial before Lord Ellenborough C. J., at the London sittings after Michaelmas term 1811, it appeared in evidence that the ship failed on the voyage in question

with a cargo of tobacco on the 25th of *February* 1810, and that the captain, having previously received instructions to wait off *Falmouth* for orders from the house of *William and John Bell and Co.* in *London*, as to the ship's port of discharge and ultimate destination, arrived off that port the latter end of *March*, and while laying on and off, received written instructions, dated on the 24th of that month, from the house of *William and John Bell and Co.*, to proceed to *Gothenburg*, and there place himself under the directions of *T. M'Nae*, their agent. The ship accordingly proceeded, and arrived at *Gothenburg* on the 14th of *April*, and there received instructions in the first instance from *M'Nae* to proceed to *Stralsund*, a *Swedish* port; but before the ship sailed, *M'Nae* having received further instructions from *Beasley (a)*, who was one of the partners in the *London* house of *William and John Bell and Co.*, but was then residing at *Hamburgh*, directed the captain to call at *Elseneur* or *Nyberg* (as the wind might favour him) *Danish* ports, for further orders from *Beasley*. On the 22d of *April* the *Imogene* left *Gothenburg* on her way to *Elseneur* for orders, and on the next day was captured in the *Baltic* by a *Danish* privateer from *Elseneur*, carried into *Copenhagen* and ultimately condemned there, by a sentence pronounced in the prize court there, as engaged in commerce of a hostile character. It further appeared that *John Bell*, the plaintiff, was a *British*-born subject, but had been resident and domiciled in the United States of *America* for upwards of 20 years, and had become a citizen of those States: that he was

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(a) It did not appear in evidence whether *Beasley* was a *British* or *American*, but he was now said to be an *American*.

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a partner in the house of *William and John Bell and Co.*, of *London*, of which house *Beasley* also was a partner, who was then residing at *Hamburg*. That at the time of the insurance and down to the capture of the vessel *America* was in amity with *Great Britain*, *Sweden*, and *Denmark*; and *Great Britain* was in amity with *Sweden*, but at war with *Denmark*: and this the captain knew. The ship had no *British* licence to trade with or go to an enemy's port. It was therefore objected at the trial that this ship, owned by *John Bell*, a *British* subject, though domiciled in *America*, could not lawfully go to an enemy's port to call for orders, without a licence from the crown, but that such going was illegal and avoided the insurance.

The second action was brought by *John Bell* and others upon another policy on the goods loaded on board the same ship *Imogene*, and the proof in this case was the same as in the first, with the addition of a letter of the 13th of *April* 1810 from *Beasley* at *Hamburg* to his partner *Wm. Bell* in *London*, which was offered by the defendant in proof that the ship with her cargo had been ordered to proceed to *Elfsneur* or *Nyberg* in *Denmark*, not merely for the purpose of receiving orders there as to her future destination, but for the purpose of trading or disposing of her cargo there, if an advantageous opportunity should occur. The letter was as follows:

“ *Hamburg*, 13th *April* 1810.

“ By the mail of to-day I write to Mr. *M^cNae* to send the *Mars*, and the *Imogene*, or *Georgia Planter*, whichever arrives first, provided he cannot sell immediately at *Gottenburg*, to *Elfsneur* or *Nyberg* for my orders: once there, I have but little doubt shall be able to dispose of the cargoes deliverable in some of the *Baltic* ports very advantageously.

vantageously. A cargo was sold that way the other day at 50 grotes; also the tobacco; we must not flatter ourselves with making much on it," &c. (Signed *R. G. Beasley*.) The objection taken upon this evidence was, that the going to *Elfsneur* for the purpose of trading, was illegal, and avoided the insurance. The plaintiffs however in both these actions took a verdict for the amount of the defendants' subscriptions, his Lordship reserving to the defendants the benefit of these objections upon a motion. A rule nisi was accordingly obtained in both actions in *Hilary* term 1812; against which, in the following *Easter* term, *The Attorney-General*, (*Gibbs*), *Park*, and *J. W. Warren* shewed cause, and *Garrow*, *Holroyd*, and *Scarlett* were heard in support of them. The cases then cited, except the case of *McConnel v. Hector* (a), were afterwards mentioned and commented on by the Court in giving judgment; in which judgment will also be found the principal arguments used at the bar. The Court took time to consider.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court in substance as follows. This was a motion for leave to enter a nonsuit in an action against an underwriter upon a policy of assurance on ship and freight on the *Imogene*, (and there was also a policy on the goods, the subject of another action) at and from *Virginia* to her port or ports of discharge in the United Kingdom, or any port or ports in the *Baltic*. The interest was averred in *John Bell* of *America*, and the loss was by capture. The ship after arriving and lying off *Falmouth*, received orders to go to *Gottenburg*, where she arrived on the 14th of

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(a) 3 Bos. & Pull. 113.

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April 1810, and was proceeding thence to *Elfsneur*, an hostile port, to get further instructions, when she was captured by a *Danish* ship. The ship had received orders at *Gottenburg* to go to *Elfsneur* for further orders from *Beasley*, who was one of the house of *Wm. Bell* and Company. The captain knew that *Elfsneur* was a hostile port. It did not appear that *W. Bell*, the partner resident in *England*, was a partner in the house in *America*. A verdict was taken for the plaintiff, with liberty to move for a non-suit, upon the point whether sailing to *Elfsneur*, a hostile port, for orders was illegal. The case was argued, and has been the subject of long and deliberate consideration with us. The question is, whether a natural-born subject of his majesty domiciled in a neutral country, such as the United States of *America* then were, can, in respect of such his domicile, be entitled to enjoy the commercial benefits and privileges belonging to the citizens of that country, and be exempt from the disabilities and restraints attaching on a natural-born subject of this country. In general it may be considered as illegal to touch at a hostile port in the course of the voyage. In *Dr. Edwards's Admiralty Cases*, p. 42. it is laid down by *Sir Wm. Scott* "that there is no rule more clearly established in principle, than that the port of destination being an interdicted port, is the port of delivery of the cargo;" which, as I understand it, means that the cargo must be presumed to be destined thither for the purpose of illegal trade. And *Sir Wm. Scott* adds, "that it is impossible to relax that principle; if it were once admitted that a ship may enter an interdicted port to supply herself with water, or on any other pretence, a door would be opened to all sorts of fraud without the possibility of preventing them."

them." Assuming then on general principles of reason and political convenience, that all intercourse with the ports of an enemy is illegal, for what purpose soever it may be, the question here is whether such resort in the case of a natural-born subject domiciled in a neutral country stands upon a different principle. The case of *Scott v. Schwartz*, *Comyn's Rep.* 677. is the first case where a question of domicile arose. That was a question whether the master and three-fourths of the mariners, who had come from *Riga* in *Russia*, could be considered as of the country from whence the ship came, some of them having been born out of the dominions of *Russia*, but being resident there. The Lord Chief Baron *Comyn*, in a most learned judgment, in which he considered the law of domicile with reference to the navigation act very much at large, declared himself of opinion that they were men of that country within the intent of the navigation act. The next case as to how far a *British*-born subject domiciled in the United States of *America* could be considered as a citizen of *America* for the purposes of commerce, so as to partake in the trade to the *East Indies*, by virtue of the treaty, in which the words are "that the citizens of the United States may trade between the said territories and the said United States," was the case of *Wilson v. Marryat*, 8 *T. R.* 31., which came on afterwards in error, 1 *Bos. & Pul.* 430. Lord *Kenyon* and the rest of the Court of King's Bench were of opinion that as *Collett* was a citizen of this country by birth, he could not throw off his allegiance to this country, but that he was also a citizen of *America* for the purposes of commerce, it being found that he had been adopted as a citizen of that country; and the circumstance of his

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being a natural-born subject here could not deprive him of the advantages of being a citizen of that country. In *Bos. & Pull. Eyre* C. J. said, "Upon what authority is it said that a natural-born subject of the king shall not trade to the *East Indies*, though he is an adopted subject of another country, whose subjects in general are allowed to trade to the *East Indies*? Shall it be enough to say the rest of the king's subjects are not allowed to trade to the *East Indies*, and therefore you being the king's subject shall not? He will answer, I have a privilege which the rest of the king's subjects have not. I am the king's subject, but I am also the subject of the United States, and *Great Britain* has granted to the subjects of the United States that they may trade. He may add, I have violated no law of my parent state in procuring myself to be received a subject of the United States. She encourages the practice, for she herself adopts the subjects of other states." But this case as well as that of *Scott v. Schwartz*, it has been truly said, neither expressly nor necessarily establish more than this, that for ordinary commercial purposes, and the general objects of trade, a *British*-born subject is capable of becoming the adopted subject of another state, so as to enjoy the privileges of commerce allowed to that state. But when a war breaks out with the parent state, it is said that natural allegiance requires that he must abstain from any act which is contrary to the interests of the parent state; that trading with an enemy is an act of that description, affording aid and comfort to the enemy, and such trading, though not of a hostile nature, may be the means of carrying on a treasonable intercourse with the enemy. And the same reason extends to the natural-born subjects of any other state

who

who have become the adopted subjects of our own country, if their parent state become engaged in hostilities. Whether these consequences have or have not in them so much probable danger as to require restriction is a question of political expediency well worthy perhaps the attention of the legislature. In the mean time we cannot help remarking that the trading with an enemy by a natural-born subject has, under certain qualifications, been recognized, as appears by the case of the *Elizabeth*, cited in *Potts v. Bell*, 8 T. R. 556., before Sir *Thomas Denison* and another common law Judge, where the goods which had been taken as coming from an enemy's port were restored to a *British*-born subject, who was established in a foreign country. Upon inquiry I find that a case has occurred at the Cockpit, before the present Master of the Rolls, in which precisely the same point was decided, and in which his Honour concurred. Contemplating these uniform authorities, according to which a trading with an enemy by a *British*-born subject domiciled abroad, has been regarded as innocent, and entitled to protection from condemnation; it is impossible for us upon this occasion to hold that these cases were not well decided. This is only a motion for a nonsuit, and therefore reserving to any one of us to consider this question if it should be presented to us in a more solemn form for our decision, we think that this rule for a nonsuit ought to be discharged.

There is a like rule pending in *Bell and Others v. Buller*.

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Tuesday,
July 6th.

The KING *against* The Justices of SUSSEX.

A certiorari to remove an order of sessions confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, and not within six months after settling the case.

D'ORLY renewed his application for a certiorari in this case (*a*), the six days notice having, since the former rule was discharged, been given to the justices, as required by stat. 13 G. 2. c. 18. s. 5. He urged as an excuse for the lateness of the application that the case had not been finally settled till the *Epiphany* sessions, before which time the parties could not come to the Court for the removal of the order; and the delay in settling the case was attributable entirely to the other side. Admitting in general that the six months would run from the time when the order of sessions was made, which in this case was at the *Michaelmas* sessions, still the above circumstances took it out of the general rule. He cited *Rex v. Winpenny*, 34 G. 1. where a similar application for removing an order for the maintenance of a bastard child was made after the six months, and allowed.

LORD ELLENBOROUGH C. J. The statute expressly requires that the certiorari shall be applied for within six calendar months after order made; and I think it will be attended with beneficial consequences if we put a strict interpretation upon this clause; as it will have a tendency to accelerate the settling of cases which are intended to be brought up for our revision.

BAYLEY J. In strictness the case ought to have been settled at the *Michaelmas* sessions, *sedente curia*.

Per Curiam,

Rule refused.

(*a*) See ante, p. 631.

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TIDMARSH *against* GROVER.Tuesday,
July 6th.

ACTION by the indorsee against the acceptor of a bill of exchange. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Easter* term, it appeared that the bill was originally accepted by the defendant, payable at *Bloxam's* and Co., with whom the defendant then kept cash. The drawer of the bill kept it in his hands three or four years after the acceptance, and then indorsed it to the plaintiff for a valuable consideration, at which time he erased the name of *Bloxam* and Co. and inserted that of *Esdaile* and Co. in lieu of it, without the knowledge or consent of the defendant. The house of *Bloxam* and Co. had failed in the interval between the acceptance of the bill, and the above alteration made upon it. Under these circumstances it was contended that the defendant was discharged by the alteration, and *Rex v. Treble* (a) was cited. His Lordship reserved the point, and the plaintiff recovered a verdict; and on a former day in this term a rule nisi was obtained for entering a nonsuit.

Where the drawer of a bill of exchange, accepted payable at B. and Co.'s; after keeping it three or four years indorsed it to plaintiff, erasing the name of B. and Co., and substituting E. and Co. without the knowledge of the acceptor, B. and Co. having failed since the acceptance: Held that plaintiff could not recover against the acceptor.

Park and *Reader* now shewed cause, and distinguished this case from *Rex v. Treble*, and *Saunderson v. Bowes* (b), in which it was decided that the place of payment was a material part of the instrument, inasmuch as those were cases of promissory notes, where the place of payment was in the body of the instrument. But in *Fenton v. Goundry* (c), which was the case of a bill of exchange,

(a) 2 Taun. 328.

(b) 14 East, 500.

(c) 13 East, 459.

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the Court held the place of payment to be immaterial. If the acceptance had been in blank, the insertion of a place where the bill was to be paid would not have made it void, *Trapp v. Spearman* (a), and *Marson v. Petit* (b): and what difference is there in effect between inserting a place where none before existed, and altering one which did exist. So in *Kershaw v. Cox* (c) *Le Blanc J.* ruled that the insertion of the words "or order" did not vitiate the bill.

The Attorney-General contra, argued that *Trapp v. Spearman*, and *Marson v. Petit* were not authorities to govern this case, because there the insertion of the place of payment after acceptance was only by way of memorandum; and that was the ground on which those cases proceeded, though it was not so stated in the note of them.

LORD ELLENBOROUGH C. J. If nothing more appeared than what appears by the note of *Marson v. Petit*, I should say that case was wrongly decided, as at present advised, but probably it was as suggested by *The Attorney-General* not written immediately under the acceptance, but only a memorandum where to find the money when the bill became due. Here if the alteration led to no other consequence than this, that the holder might have protested the bill for nonpayment at a place where the acceptor had never made it payable, and thereby put the party to an additional expence, that would be a sufficient objection. But it goes further, and causes the bill to carry with it the appearance of solvency by being directed to *Esdaile and Co.*, a solvent house, instead of *Bloxham and Co.*, an insolvent one: it purports to be an autho-

(a) 3 Esp. N.P.C. 57.

(b) 1 Camp. N.P.C. 82. n.

(c) 3 Esp. N.P.C. 246.

rity to the other house to pay the bill, and if that house had chosen so to understand it, and had paid the bill, the consequence would be that the acceptor might have become liable to an action at their suit. It therefore holds out a false colour to the holder, and likewise varies the contract of the acceptor by superadding an order upon another house to pay the bill, and therefore it seems to me to be a material alteration.

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LE BLANC J. The alteration materially varies the contract of the party who accepted. It superadds a responsibility being in the nature of a request by the acceptor to the other house to pay the bill. And notwithstanding the holder of the bill was not bound to go thither to demand payment, still he might go thither, and if he had gone, and the bill had been refused payment, he might have protested it for non-payment. In *Kershaw v. Cox* the alteration was with the consent of the defendant, and to correct a mistake in furtherance of the original intention of the parties.

BAYLEY J. I am also of opinion that the alteration varies the responsibility of the party. Very possibly the words written by the drawer under the acceptor's name, in *Murson v. Petit* were written in such a manner as to shew that they were merely inserted as a memorandum, and no part of the acceptance. If this alteration be good I do not see why an alteration to any distant place would not be equally good.

DAMPIER J. I concur in opinion with the rest of the Court. The case of *Fenton v. Goundry* only decided that the holder need not go to the place; but he may go, and that is a sufficient objection to this alteration.

Rule absolute.

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Wednesday,
July 7th.

MADDOX and Another *against* MILLER.

In an action for goods sold to an infant, the issue being *necessaries*, if any part of the articles proved to have been furnished to the defendant may fall within the description of *necessaries*, the evidence ought to be left to the jury.

ASSUMPSIT for goods sold and delivered. Plea, infancy. Replication, *necessaries*.

At the trial before *Bayley J.*, at the last assizes for the city of *Worcester*, it appeared in evidence that the plaintiffs were tailors at *Worcester*, and had furnished the defendant with clothes. The defendant, at the time of the delivery of the clothes, was under age, but lived apart from his father in the employ of a considerable barge owner, at *Stourport-on-Severn*, and had since become a lieutenant in the *North Gloucester* militia. His father was a clergyman in *Gloucestershire*, about 20 miles from *Worcester*, with an income of 700*l.* per annum, having four daughters and two sons, of whom the defendant was the youngest, all dependant upon him for support. In *August* 1809 the defendant first employed the plaintiffs, and between that time and 1810 his bill for clothes amounted to 18*l.* 2*s.* 6*d.* On the 27th *September* 1810 he paid 15*l.* in part of the then debt, which left a balance of 3*l.* 2*s.* 6*d.* due to the plaintiffs. Between *October* 1810 and *February* 1811 other articles, consisting of superfine coats and the ordinary apparel worn by gentlemen, were furnished him, to the amount of 16*l.* 4*s.* 6*d.*, for the price of which, together with the balance of the former account, this action was brought. It did not appear what salary the defendant had during his employ at *Stourport*. The defendant was not introduced to the plaintiffs by his father, but had sent for one of them to the inn to give him his first order respecting the clothes. Objection was taken upon this evidence

that it was not sufficient to go to the jury,
as there was no proof that the defendant was, at the
time of the order, in need of clothing, nor that the
clothes furnished were suitable to his condition in
life, nor that he had any income to enable him to
pay for them. The learned Judge, after hesitating on
this objection, directed a nonsuit. A rule nisi was ob-
tained in the last term for setting it aside; against which,
on a former day in this term,

~~Wm.~~
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Dauncey and *Abbott* shewed cause, and contended that
the affirmative of the issue being on the plaintiffs, they
were bound to prove that the articles supplied were
necessary and suitable to the estate and degree of the
infant; which the evidence not only failed to prove,
but proved the contrary; for it appeared that the de-
fendant was provided with clothes at the time of the
order, and the articles supplied were a description
suitable to the highest rank. The defendant was also
a stranger to the plaintiffs, and therefore they were
bound, before they trusted him, to make inquiry, as
was held by Lord *Kenyon* in *Ford v. Fothergill* (a), which
might have easily been done, as the father lived but
a short distance from them. The rules which for-
merly obtained for the protection of infants were
more strict, and have already been sufficiently relaxed;
in *Brooke v. Gally* (b) Lord *Hardwicke* said "The law
lays infants under a disability of contracting debts
except for bare necessities, and even this exemption
is merely to prevent them from perishing." And per-

(a) *Peake's N. P. C.* 229. 1 *Esq. N. P. C.* 211. S. C.

(b) 2 *Atk.* 35.

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haps the strict rule would have been the best to adhere to.

Jervis and *Paake*, contra, urged that the question was not whether the evidence was sufficient to warrant the jury in finding for the plaintiff, but whether it was sufficient for them to deliberate upon; if it was, then the nonsuit was incorrect. The question whether necessities or not is a mixed question of fact and law, and as such should be submitted by the Judge to the jury, together with his directions upon the law; and it is of importance that this should be observed, for the keeping distinct the province of the Judge and jury. In former cases it has been the practice to leave this question to the jury; Lord *Kenyon* did so in *Fothergill v. Ford*, and the jury found against his opinion; and in a late case, of *Leonard v. Roxburgh*, the same course was adopted by Lord *Ellenborough*. *Bainbridge v. Pickering* (a) seems to be the only case where the Court decided the question upon affidavit, but there the infant was living with her mother; and in *Borinsale v. Greville* (b), *Somerfet* summer assizes 1810, cor. *Bayley J.* the question was left to the jury, though the infant was living with his father.

LORD ELLENBOROUGH C. J. referred to *Clowes v. Brookes*, Str. 1101, and 9 *Viner*, 392., observing that *Strange* had not adverted to the case of *Rainsford v. Fenwick* (c), which in the margin of *Viner* appears to have been cited, and admitted per Cur. as a case in

(a) 2 Bl. R. 1325.

(b) Selwyn's N.P. p. 119. 3d edit.

(c) Carter, 215.

point; and in which *Sife* Serjt. said “these things of necessities have been referred to the Judges and not to the jury;” and *Vaughan* C. J. and two other Justices observed, “Our being Judges of the necessities is to the nature of the thing, not to the particulars, that indeed must be tried by a jury.” His Lordship also mentioned *Mackerell v. Bachelor* (d), where the plaintiff brought assumpsit for the prices of a fatten doublet and hose, with silver and gold lace; a velvet jerkin and hose, and a fustian doublet and cloth hose; the defendant pleaded infancy. Replication, that the defendant was a servant and attending upon the Earl of *Essex* in his chamber, and that the apparel was delivered to him for his necessary apparel during the time of his service: upon demurrer, the Court caused the declaration to be read, and finding that the defendant was there written gentleman, agreed clearly that the fatten, lace, and velvet were not necessary apparel for a gentleman, and therefore the action would not lie for so much, but only for the residue.” But his Lordship added, that in general certainly the question had been submitted to the jury, with such a direction from the Judge upon the law as the circumstances required; and therefore if any part of the articles might be strictly necessities, it ought not to have been withdrawn from the jury.

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The case stood over for some days, and now

Lord ELLENBOROUGH C. J. said that the Court were of opinion, that this was not so purely and exclu-

(u) *Gouldsbrough*, 168.

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sively a question of law as that some question should not have been left to the jury; the nonsuit therefore must be set aside, and a new trial had.

Rule absolute.

Wednesday,
July 7th.

CRESWELL *against* HERN.

Same *against* DEALY.

Bail having rendered their principal within the eight days allowed by the rule of *Trin. 1 Ann.*, are not liable to the costs in an action on the recognizance up to the time of the notice of render, when the proceedings were stayed.

THESE were rules nisi for referring it to the Master to tax the plaintiff his costs in these actions upon the recognizance of bail, and also the costs of his application. The plaintiff obtained final judgment in the original action, and issued a *capias ad satisfaciendum* returnable in eight days of the *Purification*, Feb. 9th, to which non est inventus being returned, on the 10th he commenced these actions and served the defendants with a *latitat*. On the 16th of *February* the bail rendered the principal, and gave notice thereof to the plaintiff's attorney, whereupon further proceedings in these actions were stayed.

Larves shewed cause, and relied on *Smith v. Lewis* (a) as being a later determination than *Hughes v. Poidevin* (b), on the authority of which this rule was obtained. He contended that as the Court in *Smith v. Lewis* allowed the bail to stay proceedings without payment of costs, they must of necessity hold in this case that they were not liable to pay them; and he referred

(a) 16 *East*, 178.

(b) 15 *East*, 254.

to the rule of court, *Trin. 1 Ann.*, and said that in scire facias on the recognizance no costs were allowed.

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F. Pollock, contra, insisted that *Hughes v. Poidevin* was directly in point, and that the Court in *Smith v. Lewis*, though they were of opinion that the bail were entitled to have the proceedings stayed unconditionally on notice of the render, did not overrule the former case. Therefore, though the plaintiff is not at liberty, according to *Smith v. Lewis*, to require as a condition of staying the proceedings that his costs shall be paid, it is still open to him, according to *Hughes v. Poidevin*, to come to the Court by a separate motion for payment of his costs. And he said the rule of *Trin. 1 Ann.*, that all *further* proceedings shall cease, meant subsequent proceedings, and not the costs of former proceedings.

LORD ELLENBOROUGH C. J. There is not any condition in the rule respecting costs, the terms of which rule were expressly adverted to by the Court in *Smith v. Lewis*, and do not appear to have attracted their particular attention in *Hughes v. Poidevin*, although the rule itself is given by the reporter in a note. The rule states, that "if bail are impleaded in debt on the recognizance, they shall have eight days to render the defendant." The effect of this is to enlarge the time for rendering the principal eight entire days, giving the bail the indulgence of being in the same situation then as if they had rendered originally at the return of the writ. The rule goes on, "and on notice thereof all further proceedings shall cease." Such being the terms of the rule, how can the Court say that *all further* proceedings shall not cease until payment of costs. That would be im-

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posing a new condition against the express language of the rule, which says, that upon notice of the render, all further proceedings shall cease. Then if the bail are still liable to be called on to pay the costs by this motion, they will be subject to a *further* proceeding.

LE BLANC J. If the Court had considered the bail liable for the costs in *Smith v. Lewis*, they ought to have made it a part of that rule.

Per Curiam,

Rule discharged.

Wednesday,
July 7th.

JOHN PHILLIPS Esq. and EMMA his Wife, and
THOMAS SHRAWLEY VERNON Esq. *against*
HENRY DEAKIN.

Devise to the use of testator's daughter for life, remainder to her first and other sons in tail-male, remainder to her daughters in tail general, with like remainders to his niece, her sons and daughters severally and successively; and for default of such issue to such of the uses, for such of the intents, and

THE Master of the Rolls directed the following case for the opinion of this Court:

Thomas Vernon, of *Hanbury*, in the county of *Worcester*, by his will, dated the 17th of *January* 1711, after giving certain annuities and legacies, devised all the rest and residue of his real estate, including the real estate in this cause, to trustees and their heirs, to the use of his wife for life, remainder to the use of *Bowater Vernon* for 99 years, if he should so long live, with a power of jointuring; remainder to trustees, during his life, to preserve contingent remainders; remainder to his first

subject to such limitations declared by the will of *T. V.* as shall be then existing, undetermined, or capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity will then admit: Held that *T. S. V.*, who would have taken a vested remainder in tail, and would then have been tenant in tail in possession under the will of *T. V.*, did not take any vested estate under the words of reference to the will of *T. V.*, during the life of the second testator's daughter.

and

and other sons in tail male, and in default of such issue to *Win. Vernon*, the brother of the said *B. Vernon*, for 99 years, if he should so long live, with like power of jointuring; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and other sons successively in tail male, and in default of such issue, to the said *W. Vernon's* brother, *Thomas Vernon*, for his life, with remainder to his first and other sons successively in tail male, with a like power of making a jointure; and in default of such issue, then to other persons, with an ultimate limitation to the testator's own right heirs. The wife of the testator died in his lifetime, and in 1720 the testator died; upon whose death *Bowater Vernon* entered upon, and continued until his death in possession of all the testator's real estates comprised in the said will. *B. Vernon* died in 1735, leaving a son, *Thomas Vernon*, who on his father's death entered upon and became possessed of the said real estates. In 1745 the said *Thomas Vernon* suffered a recovery of all the real estates devised as aforesaid, and declared the uses of such recovery to himself in fee; and being so seised in fee of the estate in question, by his will, dated the 23d of September 1771, he gave and devised all and every his manors, advowsons, messuages, farms, lands, tenements, and hereditaments whatsoever and wheresoever, late the estate of *Thomas Vernon*, deceased, (the first testator,) and also all other his (the second testator's) real estate, whatsoever and wheresoever, unto the Hon. *J. York* and *R. Lygon*, their heirs and assigns, to the use of two persons, their executors, &c. for a term of 500 years, upon certain trusts therein declared, and from and after the de-

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termination thereof, *to the use of his (the second testator's) first and other sons successively in tail male*, and for default of such issue, *to the use of his daughter Emma Vernon (now the plaintiff E. Phillips) and her assigns for the term of her natural life*, without impeachment of waste, and with such leasing powers as therein are expressed, remainder to the use of the said *J. York and R. Lygon* during the life of *E. Vernon*, upon trust to preserve contingent remainders; *and from and immediately after the decease of the said E. Vernon, to the use of her first and other sons successively in tail male*, and for default of such issue to the use of her first daughter in tail male, and for default of such issue to the use of the second and all other her daughters severally and successively in tail general, and for default of such issue to the use of the second and all other the second testator's daughters severally and successively in tail general, and for default of such issue to the use of his wife during her life, without impeachment of waste; and after the decease of his wife, to the use of his niece *E. J. L. Maude* for life, remainder to the use of the said trustees during her life, upon trust to support contingent remainders, and from and after her decease to the use of her first and other sons in tail male, and for default of such issue to the use of her first, second, and all and every other her daughters severally and successively in tail general, and *for default of such issue* he devised all his said real estates "*to such of the uses, for such of the intents and purposes, and under and subject to such of the limitations, powers, provisoes, conditions, and agreements mentioned and declared in and by the said will of my late cousin Thomas Vernon (the first testator) as shall be then existing undetermined, or*

capable

capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity will then admit of."

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Thomas Vernon (the second testator) died in 1771, leaving his daughter *E. Vernon* (now *E. Phillips*) him surviving, which *E. Phillips* has no issue. The niece *E. J. L. Maude* is dead without issue. The plaintiff *Thomas Shrawley Vernon* is the eldest son and heir of *Thomas Vernon*, who was the eldest son and heir of *Thomas Vernon*, the third tenant for life under the will of *Thomas Vernon* the first testator, and would now have been the tenant in tail in possession of the real estates given under the limitations of that will, if such limitations had not been barred by the recovery suffered by *Thomas Vernon*, the second testator.

The question is, whether the plaintiff, *Thomas Shrawley Vernon* has now, under the will of *Thomas Vernon*, the second testator, a vested estate tail in remainder in the real estates devised by the will of *Thomas Vernon* the second testator; or whether, under the words of reference from the will of *Thomas Vernon* the second testator, to the uses in the will of *Thomas Vernon* the first testator, no estate is to vest until all the prior and specific limitations contained in the will of *Thomas Vernon* the second testator, shall have determined or failed of effect.

Preston, for the plaintiff, contended that *T. S. Vernon* took a vested remainder in tail under the will of *T. Vernon* the second testator, and for maintaining this he argued that it was a rule of law not to construe a limitation in a will as a contingent remainder, if it be capable

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of being considered as vested; on which rule, he said, the case of *Doe v. Maxey* (a) was decided: and there was also another rule that words, though apparently, founding in future, shall be construed as giving a present interest, if the intent, as it is to be collected from the context, so requires; and for this he cited *Bo-rafton's* case (b), *Bromfield v. Crowder* (c), and *Doe v. Nowell* (d). As 'to the intent, he said that the plaintiff *T. S. Vernon* would now have been tenant in tail in possession, under the first will, and that the intent of the second testator was not to alter the effect of the devises contained in the first will, any farther than by postponing them in favour of his own children and niece, and their families; after which he meant to restore the order of succession to its former channel under the first will. Therefore the devise upon default of issue of his children and niece "to such of the *uses* for such of the intents, &c. in the will of the first testator as shall be then existing undetermined or capable of taking effect," &c. was not meant to describe the person who should take when the preceding estates determined, but merely to designate the uses. And this construction of the devise is confirmed by the concluding part of it, which is in the ordinary language of conveyancers, when they would direct executory estates with reference to existing uses. The devise is not only "to such of the uses, &c. in the will of the first testator as shall then be existing undetermined or capable of taking effect;" but it goes on, "or

(a) 12 *East*, 589.(b) 3 *Rep.* 19.(c) 1 *N. R.* 313.(d) 1 *M. & S.* 327.

as near thereto as the deaths of parties and other intervening accidents and contingencies and the rules of law and equity will admit;" the obvious sense of which is to describe an order of succession as near as possible to the will of the first testator, as if the second testator had said it shall go on in the same line as far as events will permit. The consequence of holding this a contingent remainder will be to suspend the power of alienation perhaps for centuries; and also to make the ultimate limitation to the right heirs of the first testator contingent: for that limitation is dependent on the words of reference, and cannot take effect, as in *Doe v. Maxey*, without them.

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Scarlett contra, admitted that the law rather inclined to the vesting of estates than suffering them to remain in contingency, and that in the construction of wills a remainder might be either vested or contingent, according to the intention of the testator, and that if the words were ambiguous, the Court would construe them so as to effectuate the general intent. He said that it was not denied on the one side that the form of words was applicable rather to contingent than vested estates, and on the other, he admitted that the testator intended that after the failure of a certain class of persons whom he had interposed, the limitations in the first will, as far as could be, should take effect. But the question is when are they to take effect, whether at the death of the testator or not until the failure of issue of the daughter? It is submitted that the latter is the period to which the words of reference point. The words are, "to such

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such of the uses, &c. as shall be *then* existing." When? The will expressly states, viz. on default of issue of the daughter or niece; that constitutes a contingent remainder: it goes on "or as near thereto as the deaths of parties, &c. will then admit;" why contemplate the deaths of parties if he meant to give vested remainders? If it had been to such *persons* instead of such *uses*, there would have been no doubt, and whatever ambiguity that word may raise is done away by the context; which taken together means that the limitations over shall not become vested till failure of issue of the daughter. If it were otherwise the tenant for life joining with the remainder-man, might defeat the subsequent limitations. The case of *Doe v. Maxey* was not decided on the construction of the will.

Preston in reply, cited the case of *Carwardine v. Carwardine (a)*, and relied as before on the rule of law which inclined to accelerate the vesting of estates, and urged that the Court would therefore construe the words of this will as descriptive of the time of taking, and not of the persons to take; and he compared it to a limitation to *A.*, remainder to the right heirs of *B.*, which he said was a vested remainder in *B.*'s right heir, without waiting for the death of *A.*, and yet it was uncertain who would be the right heir of *B.* at the death of *A.*

The following certificate was sent.

(a) *Fearn's Exec. Dev.* 4th, edit. 5.

THIS case has been argued before us by counsel, we have considered it, and are of opinion that under the words of reference from the will of *Thomas Vernon*, the second testator, to the uses in the will of *Thomas Vernon* the first testator, no estate has vested in *Thomas Shrawley Vernon* by virtue of the will of *Thomas Vernon* the second testator.

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S. LE BLANC.

J. BAYLEY.

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July 7th, 1813.

On the Part of JOHN BELL, REUBEN GAUNT BEASLEY, and WALTER BELL, who have survived WILLIAM BELL, deceased; and of the said R. G. BEASLEY, Administrator of the Estate and Effects of the said WILLIAM BELL, who died intestate, in the Matter of WILLIAM SCOTT, a Bankrupt.

*Wednesday,
July 7th.*

THE Lord Chancellor directed the following case for the opinion of this Court :

J. BELL, R. G. Beasley, Walter and William Bell, deceased, carried on business in partnership, as factors, in *London*, under the firm of *William and John Bell and Co.* *William Bell* was the only partner resident in *London*, and the concerns of the partnership there

Money advanced to *S.* by *B.* one of several partners out of the partnership funds, on account of payments to be made on poli-

cies of assurance underwritten by *S.* on account of himself and *B.* in pursuance of a previous agreement between them to become sharers in profit and loss on such policies, was held not provable under the commission of *S.*, who became bankrupt, by the surviving partners of *B.*

were

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were solely managed by him. On the 1st of *January* 1809 *William Bell* and *Scott*, the bankrupt, verbally agreed to become interested in partnership, as to profit and loss on policies of insurance on marine risks to be subscribed by *Scott*, in his own name. And on the 1st of *January* 1810 it was farther verbally agreed between them, that such partnership should be extended as well to policies to be subscribed by *Scott* for *William Bell*, as to policies to be subscribed by *Scott* in his own name. For some time previously to the year 1809 *William Bell* had been in the habit of advancing money out of the funds of the said house of *Bell* and Co. to *Scott*, for his accommodation. The sums so advanced in the year 1808 amounted to 5503*l.* 16*s.* 9*d.*, and the balance due from *Scott* to the house of *Bell* and Co. on account of such advances at the end of that year amounted to 317*l.* 14*s.* 11*d.* In the course of the years 1809 and 1810 *Scott* continued to apply to *William Bell* from time to time for advances of money; in consequence of which application *William Bell* in the year 1809 advanced money to *Scott* from time to time out of the funds of the house of *Bell* and Co., to the amount of 10,592*l.* 17*s.* 3*d.*, which amount was reduced by repayments in the course of that year, leaving a balance at the end of the year 1809, due from *Scott* to *Bell* and Co., on account of such advances, of 5077*l.* 12*s.* 10*d.* including therein the sum of 317*l.* 14*s.* 11*d.* remaining due at the end of the year 1808 as aforesaid. And in the year 1810, previously to the 31st day of *August* in that year, (on which day *William Bell* died,) *William Bell* advanced money to *Scott* from time to time out of the funds of the house of *Bell* and Co. to the amount

of

of 6280*l.* 6*s.* 10*d.*, which amount was reduced by repayments from time to time, leaving a balance on the 31st of *August*, due from *Scott* to the house of *Bell* and Co. on account of such last-mentioned advances of 4418*l.* 3*s.* 7*d.*, making together with the balance due at the end of the year 1809, the sum of 9495*l.* 16*s.* 5*d.* Of the monies so advanced to *Scott* in the years 1809 and 1810 the whole, except the said sum of 317*l.* 14*s.* 11*d.* was on account of payments to be made on policies of insurance underwritten by *Scott* on the partnership account between him and *William Bell* in pursuance of the verbal agreements so made between them, but no specific sum was applied for by *Scott*, or advanced to him for any specific loss or payment on any particular policy. The advances of money were all made by *William Bell*, by drafts in the firm of *Bell* and Co. on their bankers. No profits have accrued upon the underwriting of such policies.

The question for the opinion of the Court is, Whether under the circumstances above stated, the said *J. Bell*, *R. G. Beasley* and *Walter Bell*, as surviving partners of the said *William Bell* are, or the said *R. G. Beasley*, as administrator of the estate and effects of the said *William Bell*, is entitled to prove under the commission of bankruptcy issued against the said *William Scott*, the whole or any and what part of the said sum of 9495*l.* 16*s.* 5*d.*, the balance remaining unpaid of the monies advanced by the said *William Bell* to the said *William Scott*.

Wetherell on a former day in this term, argued on behalf of the parties claiming to prove under the commission; and as to the balance of 317*l.* 14*s.* 11*d.* he said, that
it

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it could not be affected by the illegality of the contract between *Wm. Bell* and *Scott*, having been incurred before the existence of that contract; and as to the remaining balance he said it would be hard to implicate the other partners in the transaction, because one of them made the advances out of the partnership funds for the purposes of his own private speculation. And he urged that there was no case like the present where the money had been held not recoverable by the other partners. In *Sullivan v. Greaves* (a), *Mitchell v. Cockburne* (b), *Aubert v. Maze* (c), and *Booth v. Hodgson* (d), it will be found that the actions were brought either for the recovery of losses paid, or of profits arising out of the illegal partnership; so that in those cases to have permitted the plaintiffs to recover would have been to have enforced those very agreements which the law had prohibited. But this claim is not to enforce the agreement, but is collateral to it, and it has never been decided that a loan of money, the object of which was only in an executory sense for illegal purposes, might not be recovered back. If indeed a specific sum had here been lent on a specific policy for the payment of a loss accrued under it, that might have been different; but the case negatives that, and shews that the loan was a floating loan for general purposes, and it is not even stated that it was applied to those purposes. But granting that some part of it was so applied, the parties claiming will be entitled to the residue. Suppose *A.* had advanced 10,000*l.* to *B.* on an illegal concern between them, and *B.* expends only 5000*l.*, would it not be against conscience to allow *B.* to retain the residue? Or suppose *A.* had advanced the money partly on a legal and partly on

(a) *Park's Insur.* 8.(b) 2 *H. Bl.* 379.(c) 2 *Bos & Pull.* 371.(d) 6 *T. R.* 405.

an illegal concern, could *B.* refuse to account for the whole? In *Lacassau v. White* (a) it was held that money paid upon an illegal consideration might be recovered back; and though in *Howson v. Hancock* (b) the Court resolved otherwise, that was because there the money had been paid over by consent. And in *Steers v. Lasbley* (c), where Lord *Kenyon* would not permit the plaintiff to recover on a bill of exchange given for the differences paid in a stock-jobbing transaction, yet he said that "if the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then according to the principle established in *Petrie v. Hannay* (d) he might have recovered;" thereby recognizing the possibility of a contract's existing collateral to the illegal contract. And in *Mitchell v. Cockburne*, *Eyre C. J.*, adverting to *Faikney v. Reynous* (e), observes, "that those cases were one step removed from the illegal contract itself, and did not arise immediately out of it." That is the description of the present case; it is a contract collateral to, or rather independent of, the original transaction.

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Puller, contra, was stopped by the Court.

LORD ELLENBOROUGH C. J. If there were any possibility of separating the guilty from the innocent partner, the Court would gladly have caught hold of any circumstance for that purpose. This however must be considered as if the claim were instituted in the name of all the partners for the benefit of the delinquent partner as

(a) 7 T. R. 535.

(b) 8 T. R. 575.

(c) 6 T. R. 61.

(d) 3 T. R. 418.

(e) 4 Burr. 2069.

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well as the rest. The question then comes to this, whether these advances could be recovered from *Scott*, the party to the illegal adventure. How was the money advanced? If, as it has been contended, this were a loan of money on account generally, there would have been much in the argument; but it was not an advance for general purposes, but for the very purpose of carrying into effect this illegal traffic and concern between the partners. It was argued as if the purpose for which the money was first advanced was equivocal; that it was only upon *Scott's* account and for his accommodation, but the latter part of the case expressly states that the whole, except the sum of 317*l.* 14*s.* 11*d.*, was on account of payments to be made on policies underwritten by *Scott* on the partnership account between himself and *Wm. Bell*, although no specific sum was applied for or advanced to *Scott* in respect of loss or payment on any particular policy. I take it for granted that this is the usual way in which one partner makes advances to another; and this was not a transaction, as it has been put in argument, of a mixed nature, combining a legal as well as an illegal object, to the former of which these advances might be ascribed; but the whole was illegal. Nor does this case fall within *Petrie v. Hannay*, and *Faikney v. Reynous*, as they were described by *Eyre C. J.*, as being one step removed from the illegal contract; it is to carry into effect the illegal contract itself. Under these circumstances I think an action could not be maintained to recover back these advances. It is unnecessary to go through the other cases of *Mitchell v. Cockburne* and *Aubert v. Maze*. This is clearly an attempt to recover back money advanced for the furtherance and in the very execution of an illegal contract,

and if recoverable, so might money advanced for the purpose of carrying on a smuggling transaction. These remarks do not apply to the sum of 317*l.* 14*s.* 11*d.*, which was advanced before this illegal partnership was entered into.

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LE BLANC J. The single fact stated puts an end to the argument; for it is stated that the advances were on account of payments to be made on policies of assurance; which amounts to the same thing as if they had been made on a particular policy.

The Court sent the following certificate :

THIS case has been argued before us by counsel; we have considered it, and are of opinion that *J. Bell*, *R. G. Beasley*, and *Walter Bell*, as surviving partners of *William Bell*, are entitled to prove 317*l.* 14*s.* 11*d.*, and no more, of the balance remaining unpaid of the money advanced by the said *William Bell* to *W. Scott*, under the commission issued against the said *W. Scott*, and that *R. G. Beasley*, as administrator of the estate and effects of the said *William Bell*, is not entitled to prove any thing under the said commission.

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END OF TRINITY TERM.

sell goods to the bankrupts, without communicating the name of the vendor; he does sell to them, delivering to them a bill of parcels, from which they would understand that he was the person to receive payment. If the bankrupts did not pay the defendant, still he would be bound to pay *Le Mesurier* and Co., and therefore he stands in the situation of vendee. The goods were substantially the goods of the defendant; he would be the loser if the bankrupts did not pay; therefore that constitutes a mutual credit between him and the bankrupts. The justice of the case is that way beyond all doubt; for the price must ultimately come out of the pocket of the defendant, and it would be hard if he were obliged to pay the price, and then come in for a dividend under the commission.

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 MORRIS
against
 CLEASBY.

Rule absolute.

ALLANSON and Another, Assignees of ROBERTS,
 a Bankrupt, *against* ATKINSON.

Saturday,
June 19th.

ASSUMPSIT for money had and received. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Hilary* term, it appeared that on the 17th of *July* 1810, *Roberts*, who carried on the business of a jeweller, had been arrested upon a ca. sa. at the suit of the defendant, by a sheriff's officer, who left him in custody of his brother. While in custody,

Where *R.*, a tradesman, being arrested at the suit of the defendant upon a ca. sa., placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them,

and five weeks afterwards paid over the amount to the defendant: Held that the assignees of *R.*, who had committed an act of bankruptcy before the arrest, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer, and although the money paid to the defendant was not the identical money raised by the pledge.

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Roberts proposed that the brother should take a quantity of goods out of his shop and pledge them, to the amount of the levy. A quantity of goods was accordingly taken and pawned on the 19th of *July*, and 22*l.* were raised; but that sum falling short of the amount of the levy, *Roberts* gave him more goods, which were also pledged, and made up the difference; the whole money thus raised was paid over by the brother to the sheriff's officer, who, five weeks afterwards, paid it over to the defendant; not, however, in the identical money raised by the pledge. On the 28th of *August* the officer had notice that *Roberts* had committed an act of bankruptcy before the property was taken. It was objected for the defendant, that as he was not privy to the act of the sheriff's officer in taking the goods, and only received the money in payment of his debt as the money of the sheriff, and not of the bankrupt, therefore this action was not maintainable; but the proper remedy was by action of trover for the value of the goods against the sheriff, who had taken them. His Lordship said it was clear that if the defendant had been privy to the taking he would have been a tort feazor and liable; but he doubted whether the fact of the produce of these goods having come into his hands was sufficient to entitle the assignees to this species of action; and therefore he directed the jury to find a verdict for the plaintiffs, giving liberty to the defendant to move to enter a nonsuit.

A rule nisi for that purpose having been obtained in *Easter* term,

Marryat and *Campbell* shewed cause, and contended that it was sufficient, to entitle the plaintiffs to this action, to shew that the act of bankruptcy was committed before

the money came to the defendant's hands; that if the bankrupt had, immediately upon the arrest, paid the money to the defendant, such payment would not have been protected, but would have been recoverable as money had and received to the use of the assignees. The only difference here is, that the money was raised circuitously by the pledge; but still it was the produce of goods belonging to the bankrupt, and was as much his money, as if it had been paid immediately from his pocket; and it was received by the defendant as such in satisfaction of the *ca. sa.* That it was money had and received by the defendant to the use of the assignees appears from *Kitchin v. Campbell* (a), where the Court said, "Whoever has received the money for the *bankrupt's* goods, is supposed, in justice, to have received the same *for the use of the assignees*, in whom the property of those goods by law was vested, and to have promised to pay the same to the *assignees*; there is a supposed privity of contract between the persons whose money it lawfully is, and the person who has got or received it."

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Topping and Comyn contra. This is not like the case of *Kitchin v. Campbell*, where it was held that the money arising from the sale of goods, taken after an act of bankruptcy under a *fi. fa.*, may be recovered by the assignees, in an action for money had and received, from the person who receives it. Here the defendant has not intermeddled with the goods of the bankrupt, nor with the money produced by the goods. If indeed the defendant had got possession of the goods, trover might have lain against him; or if he had received the precise sum of money raised by the pledge, there might have been some colour

(a) 3 *Will.* 307.

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for saying that he had received the produce of the bankrupt's goods; but he did not receive either the identical notes, or the identical sum. Besides, this was not a payment to the defendant on behalf of the bankrupt, for the defendant was not a party to the transaction, but a payment by the sheriff to relieve himself from a positive breach of duty. He was liable to an action for an escape; and if such action had been brought, he could not have set up the bankruptcy of *Roberts* as a defence. He was liable therefore for the debt. It would be hard then if the Court should deprive the defendant of that which he has received from the sheriff in lieu of the debt.

LORD ELLENBOROUGH C. J. This has been argued as a case of hardship. Suppose this money had been paid in regular form, it would have been recoverable by the assignees, as the money of the bankrupt paid after his bankruptcy. Therefore I cannot say that it is a case of hardship, where, if the payment had been regular, it would have been recoverable. What is the case here? On the arrest taking place the bankrupt, being desirous of time to discharge the debt, proposed to give a part of his goods in order to raise money upon them; for which purpose, he placed them in the hands of the brother of the sheriff's officer, with an explicit authority to convert them into money. It is admitted that if the goods subsisted in specie, trover would lie; and what objection is there, where they have been converted into money, to the action for money had and received? My only doubt was, whether, as the defendant did not appear to be privy to the taking, and as the money paid to him was not the money immediately produced by the disposal of the goods, this was, strictly speaking, the money of the assignees;

assignees; but inasmuch as the goods of the bankrupt were converted into money, the moment the produce of the goods, in money, came into the pocket of the defendant, I think it became money received to the use of the assignees.

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LE BLANC J. I am of the same opinion. The defendant cannot complain of hardship. No one, on considering the circumstances, if the question were put to him, whether the money was received in redemption of the officer, or as money paid by the bankrupt, could doubt that it was received by the defendant as money paid by the bankrupt to relieve himself from the arrest. Therefore the defendant received it as money paid under the execution; and whether it was put into the hands of a banker, and mixed with other money, or put into his hands immediately, it is the same thing. I think, therefore, the money may be recovered. If the defendant had chosen to object to receiving the money, he might have done so, and had his remedy against the sheriff; instead of which he is content to receive it as the money of the bankrupt.

BAYLEY J. I concur in the same opinion. I think the defendant received this as the money of the bankrupt. He might have disaffirmed the act of the sheriff, instead of which he affirms it, by receiving the money from the sheriff, not as the money of the sheriff, but of the bankrupt. If so, the assignees are entitled to recover; and there is no other hardship in this case than in others, where persons receive the property of a bankrupt after his bankruptcy.

Rule discharged.

1813.

*Monday,
June 21st.*

NICOLL *against* GLENNIE and four others, and
G. SHARPE, W. SHARPE, and G. SHARPE
the Younger.

In trover
against several
defendants, all
cannot be
found guilty on
the same count,
without proof
of a joint conver-
sion by all;
therefore where
plaintiff
brought trover
for goods
against *A.* and
B. bankrupts,
and *C.* and *D.*
their assignees,
and proved that
the bankrupts,
before the
bankruptcy,
received and
afterwards dis-
posed of the
goods by way
of pledge,
having no
authority so to
do; and that
the assignees,
after the bank-
ruptcy took
possession of
the goods,
and refused to
deliver them to
the plaintiff on
demand, and
the jury found
all the defen-
dants guilty,
there being
only one count
in the declara-
tion: Held
that the evi-
dence did not
warrant such
finding,

TROVER for 67 tons of flax; the declaration con-
tained only one count. Plea not guilty. At the
trial before Lord *Ellenborough* C. J. at the *London* sittings
after last *Hilary* term, it appeared that the defendants
Glennie and the four others were assignees of the *Sharpes*,
the other three defendants, who became bankrupt in
September 1812. The plaintiff being the owner of the flax
in question, consigned it from *Russia* to his broker in this
country, for the purpose of sale. The flax upon its ar-
rival was landed at the wharf of the *Sharpes*, who were
the wharfingers and agents of the broker, and after
some time was pledged to them by the broker on account
of bills drawn upon and accepted by them to a consider-
able amount. The flax still continued at the wharf, and,
whilst lying there, was pledged by the *Sharpes* to *Walker*
and Co. for advances made by them to the *Sharpes*, and
was transferred into the names of *Walker* and Co. After-
wards the *Sharpes* became bankrupt, and the other de-
fendants, as assignees, were put into possession of the
wharf, and the flax, together with the rest of the pro-
perty lying there. The plaintiff had since demanded the
flax of the assignees, which they had refused to deliver
up. The jury upon this evidence found all the defen-
dants guilty; whereupon in *Easter* term the *Attorney-
General* moved for a rule nisi for a new trial, on the
ground that there was no proof of a joint-conversion
by all the defendants, to warrant a joint-action against
them,

them, though if there had been separate actions the proof might have been sufficient to affect both the assignees and the bankrupts with separate acts of conversion.

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against
GLENNIE.

LORD ELLENBOROUGH C. J. The objection is rather to the finding of the jury than to the joining all the defendants in one action; inasmuch as several may be joined in trover, and yet one only be found guilty. It might have turned out on the evidence to have been a conversion by the bankrupts, continued afterwards by the assignees, so as to have made it a joint-conversion by all. I do not say that is the case here; but still the objection is not that all the defendants could not be joined, but that some of them ought to have been acquitted.

The rule was thereupon granted; and on a former day in this term *Park, Topping, and Taddy* shewed cause, and contended that the refusal of the assignees to deliver up the property, after it came into their hands, and their asserting a right to hold it as representatives of the bankrupts, was an adoption by them, and a continuance of the tortious act done by the bankrupts, in possessing themselves, and parting with the flax by way of pledge; and they compared it to *Bloxholm v. Oldham* (a), where upon a seizure and sale of the goods of a bankrupt under an execution, trover was held to lie, jointly, against the sheriff, against the plaintiff in the original action, and the vendee.

The Attorney-General, Scarlett, and Richardson, contra, admitted that in trover several might be joined, and

(a) 1 Burr. 22. cited in *Cooper v. Chitty*.

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some might be found guilty and others acquitted; but they contended that all could only be found guilty, where proof was given of a joint-conversion by all. In this case there was no such proof; for admitting that the pledging of the flax, and the refusal to deliver it up, were separate acts of conversion by the bankrupts and the assignees, as they applied to each respectively, there was nothing to connect the one with the other so as to form one joint tort. Even if the refusal by the assignees could be considered as an assent on their part to the tortious act of the bankrupts, it would not operate to make the assignees tortfeasors ab initio, unless it could be shewn that the tortious act was done for their benefit. Therefore in 4 *Inst.* 317. it is laid down that “by the forest-law, whosoever receiveth within the forest a malefactor, in hunting, &c., knowing him to be such, he is a principal trespasser;” but it is added, “wherein the law of the forest differeth from the common-law, for by the common-law he that receiveth a trespass, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case, *omnis rati habitio retrotrahitur et mandato æquiparatur.*” And there is also this inconsistency in the finding of the jury upon this evidence, that the finding the assignees guilty acquits the bankrupts, and vice versa; for a conversion to the damage of the plaintiff supposes the property to be in him when converted; therefore if the property was in the plaintiff so as to charge the assignees, there could not have been any prior conversion of it by the bankrupts, or if the bankrupts had before converted it, then the assignees are not liable. And by this mode of
 joining

joining all the defendants in one action, the plaintiff gains an unreasonable advantage, for thereby he makes the declarations of the bankrupts and the assignees evidence against each other. Therefore on every account they ought not to have been joined.

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Lord ELLENBOROUGH C.J. observed that the question was of very considerable extent and importance in its consequences; and that he had looked to being furnished with more cases upon the subject; but concluded from the known industry of the counsel who had argued the case, that there were none such.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This case was argued before us on the question whether there had been a joint conversion by the assignees and the bankrupts. It was a case where the plaintiff being resident abroad, transmitted goods to his broker in this country, which goods the broker pledged to the bankrupts on account of advances made by them, and the bankrupts afterwards pledged them to *Walker* and Co. for similar advances. Now those are acts of tort and tortious conversion of the goods prior to the existence of the assignees, in their character of assignees, and as connected with these goods; those therefore were acts of tort done without the participation of the assignees. There is, however, another act of tort stated in the case to have been committed by them as assignees, namely, their refusal to deliver up the goods, which were lying on the wharf, and had come into their possession as assignees; but with this act of tort it does not appear that the bankrupts ever intermeddled. It seems to us, therefore,

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therefore, on full consideration, that the facts of this case exclude a joint conversion by all the defendants. No joint conversion is stated in point of fact; and we think there is none in point of law. In point of fact, the bankrupts ceased to interfere when the assignees were put into possession of the goods; and in law, they cannot be considered as having any controul over them, or as having concurred in the act of refusal. The case to which this has been likened, is that, where goods have been taken by the sheriff under an execution sued out against a party, who had before then become bankrupt, and whose goods had become the property of his assignees, in which case the act of the sheriff is considered as the act of the plaintiff suing the execution. In that case, however, the adoption by the plaintiff in execution of the levy of the sheriff may make him a party to the trespass, upon the principle of *omnis ratihabitio*, &c. But there is this difference between that case and the present, that there the law might intend, from the party's subsequent adoption of the act, that he was placed in the same situation as if he had originally commanded the act; but such intendment can only be made, where the party is in a situation to have originally commanded it. Now here the assignees could never have commanded the original acts of conversion, because, at that time, they did not bear any character which connected them with the goods, and therefore could not be joint-parties to the tort. It appears to us, that in none of these acts can all the parties be so connected together, as to make one joint act of conversion by them: the acts are in themselves distinct. We have not found any material cases which throw a light upon the question.

Rule absolute.

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LANGTON and Others *against* HUGHES and Another.Monday,
June 21st.

ACTION for goods sold and delivered. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Hilary* term, it appeared that the plaintiffs were druggists in *London*, and the defendants brewers at *Chester*, that in the months of *June* 1804 and 1805 the traveller of the plaintiffs took orders from the defendants for a quantity of drugs, consisting of *Spanish* juice, isinglafs, ginger, and other articles, which he knew were for the purpose of being used in the brewery. The goods were accordingly supplied. Upon this evidence it was objected for the defendant that as by the 42 G. 3. c. 38. *f. 20.* the brewer is prohibited from using any thing but malt and hops in the brewing of beer, it was illegal in the plaintiffs to furnish the defendants with these articles, knowing the use to which they were to be applied; and that the 51 G. 3. c. 87. *f. 17.*, which was passed since the sale, and which expressly prohibits druggists from selling to brewers articles of this description, did not import that, before that act, they might sell them to brewers with a knowledge that they were to be used contrary to the former act.

Where the plaintiff, a druggist, after the 42 G. 3. c. 38., but before the 51 G. 3. c. 87., sold and delivered drugs to the defendant, a brewer, knowing that they were to be used in the brewery: Held that he could not recover the price of them.

LORD ELLENBOROUGH C. J. was of opinion that the plaintiffs in selling drugs to the defendants, knowing they were to be used contrary to the 42 G. 3. c. 38., were aiding them in the breach of that act, and therefore not entitled to recover; and he directed the jury to find for the defendants, but reserved the point. Whereupon

a rule

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a rule nisi was obtained in the last term for setting aside the verdict, and entering a verdict for the plaintiffs or for a new trial.

D. F. Jones who now shewed cause, relied as before upon the 42 G. 3. c. 38. §. 20., and on the rule that a party who is aiding in carrying into effect an illegal contract, cannot derive out of it any meritorious cause of action. Here the contract was illegal, because it was founded on an intended breach of the law ; and the plaintiffs were aiding in its execution, because they sold and delivered the goods with a knowledge of the illegal purpose for which they were intended ; they cannot therefore maintain this action. It may be argued that the statute only prohibits the use of these drugs under a penalty ; but the cases of *Law v. Hodson* (a) and *Parkin v. Dick* (b) dispose of that argument ; and in *Bartlett v. Vinor* (c), per *Holt C. J.*, “ every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.” The same doctrine was held by *Mansfield C. J.* in *Drury v. Defontaine* (d). As to the 51 G. 3. c. 87. it was not intended to confine the prohibition in the 42 G. 3. against brewers using any materials or ingredients except malt and hops, to the articles mentioned in the 51 G. 3., it was only meant to create an additional security against the traffic of drug-

(a) 11 East, 300.

(b) Ibid. 502.

(c) Carth. 252.

(d) 1 Taunt. 136.

gifts and other persons with brewers in certain specified articles.

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The Attorney-General and *Hullock* contrà, contended that the 42 G. 3. prohibited neither the selling nor the buying these articles, for the purpose for which they admitted that they were bought, but only the using them. The articles were in themselves innocent, and such as might be innocently in the brewer's possession; and if he might have them he might lawfully purchase them. The illegality consists in the subsequent user, over which the seller has no controul; and though he knows the brewer means to use, and probably will use them illegally, he is not therefore concerned in the transgression of the law. If this sale had happened after the 51 G. 3., and the articles had been within those enumerated in that act, it may be admitted that the plaintiffs could not have recovered, because the druggist is thereby expressly prohibited from selling or delivering such articles to any brewer under a penalty; which seems, according to the authorities, to amount to a substantial prohibition; but this being a sale before the 51 G. 3., that statute no otherwise applies to this case than as an exposition of the 42 G. 3., and shews what is meant in that act by the words "other material or ingredient whatever except malt and hops," viz. the deleterious materials which the druggist is prohibited from selling or delivering by the 51 G. 3.

LORD ELLENBOROUGH C. J. The object of the legislature, in passing the 42d of *George the Third*, was to protect the public health, and the public revenue; the health, which might be impaired by mixing with beer ingredients

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ingredients of a noxious and unwholesome nature, and by trying experiments with the liquors, and a large and important branch of the revenue, by providing that beer should be a liquor compounded of malt and hops only, and not of adulterated materials. There is a distinct prohibition in the act against causing or procuring to be mixed any ingredient except malt and hops; and a person who sells drugs with a knowledge that they are meant to be mixed, may be said to cause or procure, quantum in illo, the drugs to be mixed. So if a person sell goods with a knowledge and in furtherance of the buyer's intention to convey them upon a smuggling adventure, he is not permitted by the policy of the law to recover upon such a sale (a); and in the same manner in the case of bricks sold under the statutable size, which the statute requires to be of certain dimensions, for the convenience of building, and perhaps for the benefit of the revenue, the like doctrine has been held (b). Without multiplying instances of this sort it may be taken as a received rule of law, that what is done in contravention of the provisions of an act of parliament, cannot be made the subject-matter of an action. This is the rule which governs the decisions upon insurances on contraband trade, and all that class of cases where the party is connected with a previous knowledge of the illegality of the transaction. I do not say whether the 51 G. 3. may not have introduced some provisions contrary to the 42 G. 3.; but certainly as to others they are cumulative provisions; and the 17th section may well stand with the provisions in the former act. Wherever they inter-

(a) *Biggs v. Lawrence*, 3 T.R. 454. *Clugas v. Penahua*, 4 T.R. 466. *Waymell v. Reed*, 5 T.R. 599.

(b) *Law v. Hodson*, 11 East, 300.

fere the rule" is *leges posteriores priores contrarias abrogant*. By the 42 G. 3. the prohibition is express; and this agreement being in contravention of it, cannot be enforced. It has been very truly said, that the case does not state that the drugs were in fact mixed, but they were sold with a view to be mixed; and the Court will not give sanction to a contract entered into against the policy of the law.

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LE BLANC J. It is an established principle, that the Court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect any thing which is prohibited by law. The question here is whether these parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which were sold with a knowledge that they were to be used for a purpose which is prohibited by law, are entitled to recover. That depends upon the provisions of 42 G. 3., coupling them in their construction with those of 51 G. 3. The 42 G. 3. does not prohibit any druggist from selling these articles, but only any person from preparing or mixing, or procuring to be prepared or mixed from any other material or ingredient whatever, except malt and hops, any liquor to resemble or be mixed with beer, and selling the same to any brewer or other person. That is the prohibition: but nevertheless if any person enter into a contract which is to aid the brewer in the breach of this law, such person shall not be permitted to recover upon it: that is the ground upon which the plaintiffs' right is here affected. The statute imposes penalties on the person mixing those ingredients, and selling them when so mixed. Now if

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that be so, the party who sells the ingredients with a knowledge that they are intended to be so mixed, is as much disabled from recovering, as a person in *Guernsey* who sells prohibited goods there, with a knowledge that they are intended to be smuggled into *England*; and yet there is no prohibition against his selling them in *Guernsey*. Upon the same ground a person selling goods in order that they may be exported to a place where by law they cannot be exported, is not permitted to recover the price upon such a contract (a). So much for the question as it stands on 42 G. 3. It has been argued, however, that the 51 G. 3. is an exposition of the 42 G. 3., and that inasmuch as the sale of isinglass, ginger, &c. are not amongst the articles, the sale of which is prohibited by the 51 G. 3., therefore the 42 G. 3. did not mean to include them under the words other materials or ingredients whatever. It is true indeed that the 51 G. 3. does not prohibit the sale of isinglass and ginger; but imposes a higher penalty on any druggist or other person who shall sell certain articles to any brewer, without making it necessary that the druggist should know in what way they were intended to be used; the druggist must thenceforth not deal with the brewer at all. The 51 G. 3. therefore seems to have been passed diverso intuitu, for the purpose of putting a stop to all dealings whatever in those articles with the brewer. In this case if the plaintiffs had not been cognizant of the use for which the drugs were intended, they might have been entitled to recover, but inasmuch as they were, the rule of law attaches on them, which prohibits a party from recover-

(a) *Lightfoot v. Tenant*, 1 B. & P. 551.

ing the price of goods sold, where he knows at the time of sale that they are to be used in contravention of an act of parliament.

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BAYLEY J. I am of the same opinion. If a principal sell articles in order to enable the vendee to use them for illegal purposes, he cannot recover the price. The smuggling cases which were decided on that ground are very familiar. The case of *Lightfoot v. Tenant* answers almost all the arguments urged for the plaintiffs. That was a case of goods sold to be shipped against the provisions of the *East India Company's act*, and the Court held that the vendors were not entitled to recover, because they were aiding the vendee to violate the provisions of an act of parliament; here the plaintiffs were also aiding in a similar breach; therefore I think the direction of my Lord was right.

Rule discharged.

CATOR, Assignee of SPARKES, Bankrupt, *against*
STOKES, Gentleman.

Tuesday,
June 22d.

ASSUMPSIT for money had and received to the use of the plaintiff as assignee. Plea, non assumpsit. At the trial before Lord *Ellenborough C. J.* at the *Middlesex* sittings after last *Easter* term, it appeared that the defendant, who was a judgment creditor of the bankrupt, sued out execution thereon after the act of bankruptcy. An examined copy of the writ of fieri facias, and the sheriff's return that he had levied the money were produced in evidence; and upon that the plaintiff rested his case, insisting that it must be pre-

The sheriff's return to a writ of fi. fa. that he has levied the money is not sufficient evidence to prove that he has paid it over to the judgment creditor so as to charge the latter with the receipt of it, in an action for money had and received.

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sumed that the sheriff had discharged his duty, and paid the money over to the defendant; but Lord *Ellenborough* C. J. being of opinion that it was not necessarily to be inferred from this return of the sheriff, that the money had found its way into the pocket of the defendant, but that the plaintiff ought to go farther, and give some evidence of its having been paid over, nonsuited the plaintiff.

Park now moved to set aside the nonsuit, and mentioned the case of *Gyfford v. Woodgate* (a), where it had been holden that the sheriff's return was *primâ facie* evidence of the facts stated in it, upon the ground that faith was to be given to the official act of a public officer, like the sheriff, even where third persons were concerned.

LORD ELLENBOROUGH C. J. Admitting the authority of the case cited, it amounts only to this, that the sheriff's return is *primâ facie* evidence that he has *levied*, even where third persons are concerned; but it does not therefore follow that he has paid over the money. The sheriff indeed after having levied is bound to pay it over; but on the evidence given in this case, *non constat* that he has so done.

Per Curiam,

Rule refused.

(a) 11 *East*, 297.

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JUSON *against* DIXON.Tuesday,
June 22d.

TROVER for a watch. At the trial before *Marshall* Serjt. at the last assizes for the county of *Buckingham*, it appeared that a person of the name of *Jackman*, who was a baker carrying on his trade at *Wendover*, borrowed the watch of the plaintiff for the greater convenience of his trade, and hung it up on a nail in the shop. In *January* 1812 *Jackman* being in arrear for his assessed taxes, and amongst others for the house and window-tax, the defendant, who was the collector of those duties within the district where *Jackman's* house was situate, entered the house, and took the watch from off the nail, as a distress for these arrears, at which time he was told by *Jackman* that the watch was not his but the plaintiff's. There was other property belonging to *Jackman* on the premises, sufficient to have satisfied the amount of arrears. The watch was afterwards sold by the defendant, who, after retaining what was due for the taxes, tendered the overplus of the proceeds to *Jackman*, which he refused to accept. The learned Serjeant, upon this evidence, directed the jury, if they believed the watch to be the plaintiff's property, to find damages, which they accordingly did at 6*l*. He then directed a nonsuit with liberty to the plaintiff to move to set it aside and enter a verdict for that sum, if the Court should be of opinion that he was entitled to recover. A rule nisi for that purpose was accordingly obtained in the last term.

The collector of the house and window-tax under 43 G. 3 c. 161. may distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed, and the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears.

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Blossitt Serjt. and *Abbott*, who now shewed cause, contended that the defendant, as collector of the assessed taxes under the 43 G. 3. c. 161. was warranted in seizing all such goods as might be found on the premises of the plaintiff, in satisfaction of the arrears due for the house and window taxes, without regard to whom the property in the goods belonged. This they said was the result of the several acts of parliament on the subject, and referred to the 43 G. 3. c. 161. sched. A., which made the window-tax a charge upon the dwelling-house, and s. 8. by which the same persons are appointed to be collectors as are appointed under 43 G. 3. cc. 99. and 150. with the like powers as are given by those acts respectively. Now the 43 G. 3. c. 99. s. 33. empowers the collectors, on refusal by any person to pay the duties charged upon him under the regulations of that act, “to distrain upon the messuages, “lands, tenements, and premises, charged with any “sum of money, *or* to distrain the person so charged, “by his goods and chattels, and all such other goods “and chattels as they (the collectors) are hereby authorized to distrain.” The word *or* in the disjunctive shews that the two branches of the sentence were each intended to make a separate provision. The meaning probably was, that the collector might distrain, on the premises, any goods, to whomsoever they might belong; *or* might distrain the defaulter by his goods off the premises, wheresoever they should be found; and the concluding words, “all such other goods,” &c. expressly point at other goods than the goods of the debtor. Then the 38th section enacts that “all remedies, advantages, powers, &c. which by any act or acts concerning bankrupts, or concerning the method of re-

“covering

“ covering rent in arrear, are given to any creditors,
 “ lessors, or landlords respectively, shall be used by the
 “ collectors under this act, over and above the powers
 “ contained in this act.” It may be argued, perhaps,
 upon the wording of this section, that it does not give
 to the collector the common law right of the landlord
 to distrain all goods found on the demised premises, but
 that it only gives such additional powers as are conferred
 upon landlords by statute; but surely that would be a
 strange construction of the act, which would give to the
 collector a right to follow and seize goods carried off
 the premises, and yet would not empower him to seize
 them whilst they were found on the premises. The
 land tax acts contain a similar provision, as to the power
 of distress, with the act now in question, and may be
 prayed in aid of the construction contended for by the
 defendant; the 38 G. 3. c. 5. §. 17. (a), enables the col-
 lector to levy the sum assessed, by distress and sale of the
 goods and chattels of the person refusing to pay, or to
 distrain upon the messuages, lands, tenements, and pre-
 mises charged; evidently taking a distinction between a
 distress on the premises and a distress on the goods of the
 party. The same distinction is now contended for, and,
 if good, authorized the defendant to take the property of
 the plaintiff, it being found upon the premises.

Sellon Serjt. and *Best*, contra, denied that the 38 G. 3.
 c. 5. could help to explain the 43 G. 3. c. 99. inasmuch
 as by the first section of the latter act the land tax is ex-
 pressly excepted from its regulations; so that the two
 statutes are not in pari materiâ. They also denied that

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(a) Not printed at length in *Runnington's* edition of the Statutes,
See Burn's Justice, tit. Land Tax, 5. Collecting.

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the 43 G. 3. c. 99. §. 33. empowered the collector to seize any other goods, than the goods of the person in arrear. To distrain on the messuage, &c., it may be admitted, applies to the goods on the premises; and to distrain the person by his goods, very probably applies to goods not on the premises; but still there is nothing to extend the remedy to goods not the property of the person distrained; the act stops short of giving the common law remedy of the landlord to the collector, which if it had been intended to give, it would have so expressed. There are several clauses in this act which cannot be reconciled with the construction, that the landlord's remedy was the thing meant. The 35th section, for instance, recites, that "whereas it may frequently happen that persons quitting their dwelling-houses or places of residence, may remove to other parishes or places, without first discharging the duties charged upon them, whereby the said duties made payable by this act will be lost, unless the person or persons removing, can, after such removal, be made to pay," &c. It may be asked how this clause is to be reconciled with the construction that the act gives the collector the like remedy with the landlord; for if it does, how could the duties be lost by such removal, when the goods of the succeeding occupier would be liable? The 33d section, on which the defendant relies, is at best but an ambiguous one; the words, "all such other goods and chattels as they are hereby authorized to distrain," &c. it is said can only mean the goods of other persons; but where does this act authorize them to distrain the goods of other persons? The 37th section does indeed authorize them to distrain goods already taken in execution, if the party suing out the execution refuse to pay the arrears of taxes due from his

his debtor; and it is probable that to such authority the above words in the 33d sect. refer. But the collector's power is derived wholly from the statute, and the statute has not given him any other of the landlord's remedies, than such as are conferred upon the landlord *by any act or acts*; whereas the remedy which the landlord has of distraining all goods found upon the premises to whomsoever belonging, is not a statutable remedy, but one which is derived to him by the common law. The window and house taxes are not a charge on the premises but on the person only; the land and property taxes are the only taxes which are a charge on the land. That the window tax is not such, appears from 43 G. 3. c. 161. Sched. A. Rules 4 & 5. charging the occupier, or his executors, &c., annually, or in case of a change in the occupation, according to the time of his occupation; and Sched. B. Rule 1. as it respects the duties on houses, has a similar provision. Upon the whole, a comparison of these acts will be found not to support the positions contended for on the other side.

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LORD ELLENBOROUGH C. J. This is an action by the owner of a personal chattel, viz. a watch, found by the defendant hanging up in the house of a person who was in arrear for house and window tax, and seized by the defendant as collector of assessed taxes, for the arrears so due, not from the owner of the watch, but from the person in whose house it was found. The question is, whether this watch, not being the property of the debtor to the crown, is liable to be taken in respect of the place in which it was found; in other words, whether by the act of parliament the collector has the same power of distress, which a landlord has for rent, namely,

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namely, to distrain any goods which may be found on the premises. The collector acted under the 43 G. 3. c. 161. s. 8. which gives him all the powers contained in 43 G. 3. c. 99. By the 33d section of this last act, the collectors are empowered “ to distrain upon the messuages, lands, “ tenements, and premises charged with any sum or “ sums of money, or to distrain the person or persons “ so charged, by his or their goods and chattels, and all “ such other goods and chattels as they are hereby au- “ thorized to distrain.” The expression of distraining on the premises is found in the land tax act 38 G. 3. c. 5., and was probably used in other prior acts, because we know that all the land tax acts are very similar. As applied to a landlord’s remedy for his rent, it is a familiar expression, and must be understood in the same sense, when applied to the officer of the crown: and the latter part of the sentence, “ and such other goods,” &c., shews that other goods than those which were the property of the party were intended to be subjected to the distress; and these latter words can only be made operative by giving to the preceding words “ to distrain on the premises” their ordinary sense when applied to landlords. And really there is great convenience in giving this construction to the statute, in order to protect the collector from the peril to which he might otherwise be exposed by the tricks of defaulters if he were answerable for seizing the goods of third persons found on the premises, and from which this section seems to have been intended to relieve him. The collector therefore is put in the place of landlord; it is enough for him that the goods are upon the premises. Thus the case stands upon s. 33. but s. 38. reflects light upon it. That section gives to the collectors “ all remedies and powers which, by any act or acts

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concerning bankrupts, or concerning the method of recovering rent in arrear, are given to creditors, lessors, or landlords;" but it cannot have been meant to give them the same remedies which were given to landlords by statute, unless it was also meant to give them the means to conduct them to that end, namely, the remedy which the landlord possessed at common law. If such would be the probable construction of *§. 33.*, it is therefore rendered more probable by *§. 38.* It would certainly have been more simple and direct, to have said that the officer should have all such powers as landlords have; but though the legislature have spoken indistinctly, the question is whether they have not spoken to the same effect, and by extending the power of distress to other goods than those of the party, have not virtually extended it to goods found on the premises. As to the 37th section, it relates to another subject, and affords no argument against this construction of the 33d section; it places the collector, in the case of an execution sued out against the goods of any person in arrear for taxes, in the same situation as the landlord is placed in, by other statutes, in case of an execution sued out against the goods of his tenant whose rent is in arrear. It therefore rather shews that the legislature intended to give the collector all the landlord's remedies.

LE BLANC J. The Court is called upon to put a construction upon the 43 G. 3. c. 99. *§. 33.*, and the question is, whether the power to distrain on the messuage and premises, means any thing different from distraining on the person by his goods and chattels. The collector has distrained for the window tax, amongst other assessed taxes. In order to discover the meaning of the legislature, we must look at the other clauses of this act,

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act, and at other revenue acts, in which the same expression occurs. Amongst others, we have been referred to the 38 G. 3. c. 5., where the distinction is very clearly marked; for the collector is there empowered to levy the sum due, by distress and sale of the goods of the person neglecting or refusing to pay, or he may distrain upon the messuages, lands, tenements, or premises; evidently not including the same things in the one expression as in the other; and it is impossible to give them any other construction than this, that they apply to distraining upon the goods of the person, wheresoever found, and upon goods on the premises, to whomsoever belonging. The 43 G. 3. c. 99. §. 38., though it does not give, in express terms, all the powers given to the landlord, shews clearly that the legislature intended to put the collector, for many purposes, in the situation of landlord; and that affords a clue to the construction of the 33d section, which gives him authority to distrain upon the messuages, lands, tenements, and premises. Looking at this, and the other acts upon similar subjects, I think it clear that the legislature meant to arm the collector with a power similar to that which a landlord possesses, viz. to take any goods found on the premises of a debtor of the crown.

BAYLEY J. I am of the same opinion. I think that the 43 G. 3. c. 99. §. 33. gives the power to the collector in the alternative, either to distrain any goods, to whomsoever belonging, which may be found on the premises; or to distrain the goods of the defaulter wherever they may be found. The meaning of distraining on the messuage is explained by a reference to the land tax acts; it is there put in contradistinction

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to distraining the goods of the party, and means generally the goods of any persons whatever which may be found on the premises. The 38th section certainly throws light upon the 33d; if, as it has been contended, that section confines the remedies given to collectors to the statutory remedies of landlords, it falls in exactly with the construction that the former section was intended to give the common law powers; for the 38th section superadds the remedies, which it gives, "over and above the powers contained in this act."

Rule discharged.

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GRAHAM *against* TATE.

Tuesday,
June 22d.

ASSUMPSIT for money paid, laid out and expended, money had and received, and on an account stated. Plea, non assumpsit.

At the trial before *Clayton* Serjt. at the last *York* assizes it appeared, that the plaintiff had been tenant to the defendant of a house and land under a lease for a year, at a certain rent payable half-yearly; the tenant to pay all taxes, except the landlord's property tax, which the defendant agreed to allow; and the tenant agreed to lay out 20% in repairs, which the defendant also agreed to allow. The last half year's rent having been in arrear, the defendant distrained, and sold to the whole amount, without any deduction either for repairs or for the property tax, which had before that time been paid by the plaintiff to the collector, and was known to the defendant

Where the tenant of premises, under a lease, and at a rent payable half-yearly, agreed to pay all taxes, except the landlord's property-tax, which the landlord agreed to allow, and the tenant agreed to lay out 20% in repairs, which the landlord also agreed to allow, but afterwards distrained for half-a-year's rent, and sold to the whole amount, without allowing either for repairs or property-tax,

which he knew the tenant had paid to the collector: Held that the tenant might recover, in respect of the property-tax, but not in respect of the repairs, in an action for money had and received against the landlord.

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to have been so paid. At the trial it was objected for the defendant, that the money was not recoverable in this form of action; that as to the property tax, the stat. 46 Geo. 3. c. 65. had provided that it might be deducted out of the first payment thereafter to be made on account of rent (a); and if this action were maintainable, every landlord, who had not allowed the property tax, would be liable to an action by his tenant without notice. The learned Serjeant nonsuited the plaintiff, giving liberty to move in order to bring the question before the Court. Accordingly a rule nisi having been obtained in the last term for setting aside the nonsuit, and entering a verdict for the plaintiff,

Hullock now shewed cause, and contended, that neither the money for repairs nor for the property tax were recoverable in this form of action: that as to the allowance for repairs, there was a special agreement under which the plaintiff ought to have declared, and not in this form of action; and as to the property tax, it seemed doubtful whether any action would lie for it; for the whole rent having been levied by the landlord without making the proper allowance in respect of the property tax, the plaintiff might have obtained the deduction by an application to the commissioners of the district. But supposing an action would lie, still the plaintiff has mistaken his remedy. The moment the property tax was paid to the collector, it became a payment of rent pro tanto; therefore at the time of the distress, the rent due, was only the half-year's rent minus the property tax. Now the levying a sum of money by distress, beyond the amount of the rent due, is not the subject of an action

for money had and received, but of a special action on the case on the statute of 2 & 3 *W. & M. sess. 1. c. 5. s. 2.*, which directs that after the sale of a distress the overplus (if any) shall be left in the sheriff's hands for the owner's use.

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Barrow, contra, was stopped by the Court.

LORD ELLENBOROUGH C. J. The tenant was obliged to pay the full amount of the rent under the distress, if the landlord would not consent to make the deduction in respect of the property tax; and it does not appear to me that he has any remedy except by bringing an action. If so, the only question is as to the form of the action. It seems to me that he may waive the tort and bring an action for money had and received, if, in the result, the landlord has got money into his pocket, which does not belong to him. If any consequential injury had been sustained, damages for such injury must have been recovered in another form of action.

LE BLANC J. The landlord having distrained upon the goods for rent, the tenant, in order to redeem them, was obliged to pay what he demanded. I should doubt whether the commissioners could have compelled the landlord to refund.

LORD ELLENBOROUGH C. J. added, that the Court was of opinion in favour of the defendant upon the question of repairs.

Per Curiam,

Rule absolute.

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The KING *against* The BAPTIST Mill Company.

The lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated to the poor, as *occupiers of land*, in the parish where the manor lies; none of them being resident in the parish.

THE defendants were rated to the relief of the poor of the parish of *Rowberrow*, in the county of *Somerset*, under the following assessment;

Proprietor,	Occupier,
<i>John Leacroft, Esq.</i>	<i>Baptist Mill Company</i> — For lot, toll, and free share of the calamine and for calamine yard, and barn. Amount 9 <i>l.</i> 0 <i>s.</i> 0 <i>d.</i>

Against which assessment they appealed to the quarter sessions, when the justices directed the rate to be amended by expunging therefrom “the calamine yard and barn,” and assessing the “lot, toll, and free share of the calamine,” at the sum of 8*l.* 13*s.* 2*d.* instead of 9*l.*, subject to the opinion of this court, on the question whether the lot, toll, and free share of calamine was, or is rateable, upon the following case:

By indenture of the 1st of *October* 1810, reciting that *John Leacroft*, as lord of the manor of *Rowberrow* in the county of *Somerset*, was entitled to a lot, toll, or free share of all calamine or lapis calaminaris raised within the manor, in the proportion of one part in four, and which had been lately received by him at only three parts in twenty in the inclosed lands, but was not yet ascertained in the uninclosed lands; and also reciting that certain persons therein named, styling themselves the *Baptist Mill Company*, had agreed to take the said lot or free share of the said *John Leacroft*; the

said

said *John Leacroft* demised to the said persons so stiling themselves the *Baptist Mill Company*, all that the said part, purpart, lot, and free share of the said *John Leacroft*, as lord of the manor of and in all calamine stone or lapis calaminaris raised or gotten, or to be raised or gotten in the inclosed lands, or the wastes or other lands within the said manor, or which he had right to claim or demand; with liberty to take and carry away the same: and also a building in *Rowberrow* called the Calamine Barn, with the oven therein to calcine calamine, together with the yards and other buildings and premises belonging to the same: to hold to the lessees, their executors, &c. for a term of 10 years, yielding and paying therefore the yearly rent of 210*l.* half-yearly, on the 1st of *April* and 1st of *October*; the first payment to be made the 1st of *April* following. The said manor of *Rowberrow*, is in the parish of *Rowberrow*, and the said *John Leacroft* is seised in fee of the said manor, and of the mines within the same. Before the making of the rate above mentioned the lessees underlet the calamine barn and yard to *Thomas Tovey*, who at the time of making the rate and since has occupied the barn and yard. There are no other buildings or premises, and the lessees are not nor were at the time of making the rate, in the occupation of any land or buildings whatsoever within the parish of *Rowberrow*, unless the Court shall be of opinion, as the Sessions were, that the lot, toll, and free share above mentioned are to be considered as land. All the lessees reside in *Bristol*, and their agent lives in *Shipham*, an adjoining parish to *Rowberrow*, but attends frequently at the different calamine pits in the parish of *Rowberrow* to collect the free share from the miners, who raise the calamine. The lessees run no risk nor incur any expence whatever, and have

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since the commencement of the lease received a quantity of calamine, as the lord's lot, toll, or free share, of a considerable value.

C. F. Williams, and *W. G. Adam*, in support of the order of sessions, relied upon the rule laid down by *Eyre C. J.* in *Lord Bute v. Grindall* (a), "that the person who is in the possession of the immediate profits of land, may be taxed to the relief of the poor, in respect of those immediate profits; that quoad these immediate profits of the land, he is an occupier of the land, within the meaning of those authorities which have decided that the occupier only can be assessed to the relief of the poor." They urged that the lessees were entitled, under this conveyance, to all the rights which the lord of the manor was entitled to, i. e. to one-fourth of the immediate profits of the land; and they cited *Rowls v. Gells* (b), and *Rex v. St. Agnes* (c), as decisive, unless the authority of those cases could be impugned. The subsequent cases of *Rex v. Nicholson* (d), and *Williams v. Jones* (e), will not be found to impugn their authority; for they only decided that the lessee of a ferry was not rateable in respect of the occupancy of the tolls unconnected with any visible property in the parish; and in *Rex v. The Bishop of Rochester* (f) the Court, in deciding that the trustees of certain mines were not rateable, in respect of the rent reserved on a lease of them, which contained a liberty to the tenants to dig for ore, &c. expressly stated "that if hereafter the tenants should open the ground and raise the ore, the trustees would then be entitled to certain

(a) 2 H. Bl. 266.

(b) Cowp. 451.

(c) 3 T. R. 480.

(d) 12 East, 330.

(e) *Ibid.* 346.

(f) 12 East, 353.

proportions, and such profits might come within a different rule, as lot and cope."

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Horner and *E. Laues* contra, relied upon *Rex v. Nicholson*, and *Williams v. Jones*, as establishing this principle, that a person is not rateable as occupier of an incorporeal hereditament, unless it be annexed to some local visible property within the parish. They then argued that the defendants under the conveyance to them from *Leacroft* took merely an incorporeal hereditament, which was not properly the subject of demise, because not a thing manurable, out of which a rent could be reserved, or to which the lessor might have resort to distrain (a): neither would trespass quare clausum fregit lie for it, but only upon an asportavit as for goods and chattels. And it is expressly negatived that the defendants were the occupiers of any land within the parish, unless the lot be considered as such. This therefore being only an incorporeal hereditament and not annexed to any local visible property, the case falls precisely within the principle above stated, and must be governed by it. It may be further observed that this mineral, whilst it remained in its native bed, was not the subject of taxation, because the mine itself is virtually excepted out of the 43 *Eliz.* by the express mention of coal mines only; and therefore if the mineral is rateable at all, it must be so after it has been raised and separated from the mine, and become vested in the defendants as personal property only. The case of *Rowls v. Gells* may perhaps admit of such a clear distinction as will make it unnecessary to controvert its authority, though it may be observed that Lord *Kenyon* in *Rex v. Parrot* (b) seemed to doubt it. But the ob-

(a) *Co. Lit.* 47. a. 144. a.(b) 5 *T.R.* 596.

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vious distinction is this, that there the lessee of the crown was stated to be the occupier of other visible property, and not, as here, of the lot and cope only; for the case states that he was entitled to the privilege of quarter-cord, which is a right of using a certain portion of land adjoining to the mine, for the purpose of working it. *Rev v. St. Agnes* also comes within the same distinction, because the toll-tin was gotten in the lands of the person held to be rateable. If however these cases should be thought not capable of such distinction, then it is submitted, that they go too far, and ought to be re-considered upon the present occasion.

Lord ELLENBOROUGH C. J. If these lessees of lot, toll, and free share are rateable at all, it appears to me they must be rateable as for property falling under the description of land. The question is, whether the words "all that part, purpart, lot, and free share of *J. Leacroft*, as lord of the manor, of and in all calamine stone raised or gotten, or to be raised or gotten," &c. can be considered, within the meaning of the statute for the relief of the poor, as land. There may perhaps be doubts whether these lessees representing the lord of the manor, in whom the right subsists as the real owner, could in law have maintained trespass quare clausum fregit for this calamine stone. I do not pronounce an opinion on that. This however appears to me to be a demise of a specific portion of the produce of land, or in other words, land itself, free from risk or uncertainty; it is by the express terms of the finding stated to be an interest without risk. We might otherwise have been pressed with the question, whether the naming coal mines in the statute, was, according to the rule *expressio unius exclusio alterius*, to

all

all intents an exclusion of other mines; or was only put for example, as the naming a class in the statute of *circumspecte agatis* (a): for certainly the Judges who have held it to amount to the exclusion of other mines, have generally coupled it with this reason, that other mines are subject to risk. Now here the portion of calamine is divested of risk; it is the clear profit, to which the lord is entitled, independent of any contingency. It is not stated whether it is by agreement, or custom, that the person who works the mine is bound to yield to the lord a portion. It is merely stated that the lord is entitled to one part in four. However that may be, here the whole is raised by the labour of the adventurer, and, when raised, the lord is entitled to one-fourth of it. Until raised, the lord may be considered as working with the adventurers by the hands of the labourers; but, when raised, the lord's share redounds to him. That constitutes land, and may be fairly construed as such within the meaning of this statute. The case of *Rowls v. Gells*, and the other cases, do not admit of any distinction comprehending this case. This is not merely a demise of a personal chattel, of the ore after it is gotten, but of the ore which is to be gotten, and which is part of the solid mass of the land; therefore under that description it is assessable in the hands of the occupier.

LE BLANC J. I concur in opinion with my Lord that this property is rateable to the poor. From the time of its decision in 1776 down to the present time, I believe the case of *Rowls v. Gells* has never been determined to be other than law; on the contrary it has been acted

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(a) 2 Inst. 487.

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upon in those counties where property of this description subsists. It has been held that persons who are not inhabitants must, in order to become rateable, be the occupiers of some species of property falling within the statute. The question has always been whether the party rated could or could not be brought within the description of the statute. The statute describes this class of persons as occupiers of lands, houses, tithes, coal-mines, or saleable underwood. The construction that has been put upon the statute has been this, that whereas the legislature expressed coal-mines, they did not mean to include any other mines; and the reason given for such a distinction was, that other mines were considered as matters of hazard at that time, and therefore it was concluded that the legislature did not mean to subject the occupier of such a species of property to taxation. It remains then to be seen what construction the decisions have put on the words, "occupier of land," in order to determine whether a party, who is in the receipt of a considerable revenue, which is not subject to risk, and arises out of land, may not be comprehended under the term occupier of land. In determining this, we are not tied down to follow the strict definition of land through all its consequences and in every possible view in which it may be considered, and to decide whether this would enable the party to maintain trespass quare clausum fregit, or whether it corresponds in every other incident with the definition of land. In *Rowls v. Gells* it was considered that the lord who received a stipulated benefit from the profits or value of mines, in case they did prove of value, was an occupier jointly with the adventurers, and not excusable, upon the same ground that excused the adven-

turers, namely, that the adventure was uncertain, or might prove unsuccessful; but the lord was held for the purpose of being rated as an occupier. Here the party shares with the adventurer, without incurring any risk, and *Rowls v. Gells* determined such person to be chargeable as occupier. What reason is there for saying that *Rowls v. Gells* was an erroneous decision? It is not necessary in construing the words of this statute, which was passed for a particular purpose, to hold that the word lands should satisfy every possible view under which land may be considered. Here it is enough that the party is an occupier of land for the purpose of being rated to the relief of the poor. Where a person receives, without risk, part of the produce extracted from the bowels of the earth, he is an occupier of land; but where he merely receives a rent, or money payment, there the Court has held, as in *Rex v. Bishop of Rochester*, that he is not an occupier. It is said, however, that we ought to overturn *Rowls v. Gells*, and *Rex v. St. Agnes*, unless we can distinguish them from this case, but I see no reason why the Court should hold those cases to have been improperly determined, especially where they have laid down a rule of construction which has prevailed for nearly 40 years, and has been the guide of the courts below. As to distinguishing them I cannot feel the weight of the observations which have been made with that view. In *Rowls v. Gells* and *Rex v. St. Agnes* the rate was confined to the person in respect of the toll-dish of lead and tin raised; here the owner of the land is entitled to a certain portion of the ore when raised, which he lets, or allows persons to stand in his place as to that share; and we will not enquire whether this was a legal demise, for he authorizes them to receive and

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they do receive it. They stand therefore in the situation of the lessee in *Rowls v. Gells*, and the person entitled in *Rex v. St. Agnes*. But subsequent cases have been cited in which it is supposed that the authority of *Rowls v. Gells* and *Rex v. St. Agnes* has been disturbed; which supposition is only raised by laying hold of particular expressions of the Court to be found there. The cases of *Williams v. Jones* and *Rex v. Nicholson* are totally different; for those were the profits of a ferry, arising out of a right to convey passengers over a river; it was impossible in those cases to say that the persons were occupiers of any thing but the boat and tackle in which the passengers were conveyed, in the same manner as a stage-coachman is the owner of his coach; it was therefore impossible to make the doctrine of *Rowls v. Gells* bear on those cases. Viewing all the cases on the subject, and the principle upon which *Rowls v. Gells* was decided, and likewise the public convenience, as it regards this species of property, and not seeing that the original construction on the words, occupier of land, may not comprehend a person so far an occupier as to receive a portion of the land discharged of any risk, I cannot say that this company is not rateable.

BAYLEY J. I am of the same opinion. The soil belonged to *Leacroft*, as lord of the manor; the persons working the mines are not tenants under him, but he has the actual occupation and possession of all the land and the subject of the land. The workers of the mines have, as a compensation for their labour and expences, a certain part of the profits, and the owner of the soil has a share also, which is given to him not in the character of landlord, but as his share of the immediate perannuity

of the profits of the land. I consider him as having a qualified occupation, perhaps a more direct one than the adventurers, who may be considered as servants to him, for they work the land to a certain extent for his benefit, and are to pay him his share of the original produce of the land. In *Rex v. The Bishop of Rochester* the lessors had dispossessed themselves of all right of occupation, by leasing the mines; and it was attempted to rate them in respect of the rent reserved to them as reversioners, the sole right of occupation being in another person. So in *Rex v. Nicholson* and *Williams v. Jones* there was no pretence for setting up any person as an occupier of land. The cases of *Rowls v. Gells* and *Rex v. St. Agnes* proceeded on the idea that the lord might be considered as occupier of lands, and rateable in that respect. Indeed it is conceded that if the lord had not made a lease he would have been rateable; but a distinction is made that here is a demise, not of the land, or any interest in the land, but of lot, toll, and freeshare; and so it does not operate until the lot, toll, and freeshare are severed from the land; but it seems to me as if the lease demised a share in the produce of the land before the mineral is raised: it was intended that these lessees should have every benefit, which would otherwise have resulted to the lord. I cannot therefore distinguish this from the case of granting a share in the land, which is not co-extensive with the entire interest. It is not doing any violence to this lease to consider the lessees under it as occupiers of land. I lay out of consideration all the cases in which it has been holden that adventurers are not liable.

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Order of sessions confirmed.

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Hiring for a year at 13s. 6d. per week, and to be at liberty to be absent during the sheep-shearing season, but to find a fit man, at his own expence, to do his work during his absence, but his own wages to go on during the whole time, will not gain a settlement.

The KING *against* The Inhabitants of ARLINGTON.

UPON appeal, the court of quarter sessions quashed an order of two justices removing a pauper from the parish of *Arlington* to the parish of *Wilmington*, both in the county of *Suffex*, subject to the opinion of this Court on the following case: the pauper was hired for a year from *Michaelmas* 1809 to *Michaelmas* 1810, as shepherd to *J. King*, of *Wilmington*, to receive 13s. 6d. per week wages, and an allowance for a hog, and to be at liberty to be absent during the sheep-shearing season, but to find a fit man at his own expence, to do his work during the time of his absence, but his own wages of 13s. 6d. a week were to go on during the whole time. The pauper served the year in *Wilmington* accordingly, was absent during the sheep-shearing season, and employed and paid a person to tend the flock, but occasionally returned during that period, and assisted in the management of it, especially on *Sundays*, and from time to time gave directions to the person employed by him.

D'Oyly and *Roe*, who argued against the order of sessions, were called upon by the Court, and asked how a year minus the sheep-shearing season could be made to amount to a year. They admitted that if it was to be taken as part of this contract, that the pauper had an unconditional liberty of being absent during the sheep-shearing season, the case would fall within *Rex v. Empingham* (a); but they relied on this distinction, that this

(a) *Burr.* S.C. 791.

was only a conditional liberty of absence provided the pauper could find a substitute at his own expence, but his wages were still to go on as usual, which implied a continuance of the service, and it appears he did occasionally come backwards and forwards. Under these circumstances the question was whether the servant of *A.*, though for a time working with another person, might not continue the servant of *A.*, or whether this was any thing more than an alteration in the nature of his service with his original master.

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LORD ELLENBOROUGH C. J. It has never been determined that a contract for service by deputy is service by himself. The distinction taken in all the cases is whether the liberty of absence forms a part of the original contract, so as to be an exception out of it, or whether it be by permission of the master during the continuance of the contract. If this hiring could be deemed to confer a settlement, the consequence would be that a person might gain as many settlements as there are 40 days in one year. He might hire himself to *A.*, with liberty to be absent with *B.* and *C.*, and so on, and if he could get 40 days service with each, he might accumulate eight or nine settlements in the course of a year. Such a consequence would be preposterous. What does this hiring really mean? A hiring for a year is where the servant is to be under the controul and command of his master for the whole year; but here the pauper was not to be so, but was to be at liberty to find a substitute for the sheep-shearing season. The case will scarcely bear a serious argument. It has been laid down in *Rex v. Empingham* and other cases, that if it be an exception out of the original contract at the time of making it, no settlement

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tlement can be gained under it; here it was an exception,
and therefore no settlement.

Per Curiam,

Order of sessions confirmed.

Courthope and Bowen were in support of the order of sessions.

Friday,
June 25th.

The KING against J. P. HEYWOOD Esq. and
Another.

The 13 G. 1. c. 23. § 5., for settling "disputes between clothiers or makers of woollen goods, and weavers, or persons employed in such manufactures," does not relate to demands against clothiers by the owner of a scribbling and carding mill for work done by him for the clothiers in teasing, scribbling, carding, and stubbing the wool at his mill: therefore the Court refused a mandamus to two justices to hear and examine such demands.

HOLROYD obtained a rule nisi for a mandamus to the defendants, being justices of the West Riding of *Yorkshire*, commanding them to summon four persons of the names of *Dyson, Wheatley, Thornton, and Webster*, and to hear and examine upon oath the demands of one *Joshua Hirst* against the said four persons respectively, and to adjudge such satisfaction and to give such costs and damages to the party grieved, as in the discretion of the said justices should seem reasonable, pursuant to the statute 13 G. 1. c. 23. § 5.

This application was founded on the affidavit of *Hirst*, which stated that he applied, at a special sessions, on the 14th of *May* 1813, to the two justices named in the rule, to grant him summonses, in pursuance of the authority given to them by the act, against the said four persons, who were clothiers, for certain debts due to *Hirst* from them respectively, amounting to 91*l.* 16*s.* 8*d.* due from one, and in the whole, to upwards of 140*l.*; that he stated to the justices that the debts became due to him for work and labour done by him for the said clothiers, at their request, in the course of manufacturing woollen cloth, viz. in teasing, scribbling,

scribbling, carding, and stubbing their wool at his mill.

In the West Riding of *Yorkshire* there are a great many large mills called scribbling and carding mills, which are filled with machinery for performing that process towards the making of cloth, which the wool undergoes between the time of its coming out of the woolstaplers hands and its being delivered to the weaver. The clothiers universally send their wool to these mills to undergo the above process, and become indebted to the mill-owners in large sums of money for the work performed upon it at these mills. The work done at the mills is called teasing, scribbling, carding, and stubbing; teasing, or, as it is sometimes called, wooleying, is done upon a large cylindrical machine, which has a number of iron hooks on the outside, and being kept in a quick rotatory motion catches the wool which is brought to a proper distance, and drags it to pieces. Scribbling is next, which is done by a machine containing a number of rollers covered with cards, that run nearly in contact with each other, and the wool going between them gets a second dressing: carding is similar to scribbling, the wool gets further dressed, and comes out of the machine in long rolls, which are pieced together by children, and afterwards go to be stubbed; which is nothing more than spinning them smaller in a billy, an instrument that contains a number of spindles turned by the hand, and is then ready for the weaver. In this process a great number of hands are employed in the mills, as many, if not more than were employed under the old system, but a vast deal more work is done in the same time. Formerly the whole work, which is now done at the mills, was performed at the weaver's house, the scribbling

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bling was done by the hand, upon a scribbling box, covered with a coarse card; the carding was performed on a similar instrument but less and with finer cards, and the wool was afterwards spun upon a single spindle, turned by the hand. Whilst the work was done thus, the weaver was the principal servant of the clothier, and the other persons mentioned in the act to be employed in the manufacture, were his family or his neighbour's children taken into his house; for women and children commonly did the work unless when the weaver or clothier sometimes scribbled the wool himself.

Topping and Foljambe now shewed cause, and made two objections to this application; 1st, that the person applying was not within that class of persons described in the 13 G. 1. c. 23. The object of the legislature was to afford a summary remedy for the settlement of disputes and demands between the clothiers and makers of woollen goods, and the persons employed in such manufacture, as their servants, by enabling such persons to enforce their demands upon oath against their masters; but not to extend the remedy to demands between clothiers and master-manufacturers, such as the present applicant, who never was employed as a servant to the clothiers. The present demands therefore are nothing less than demands between two descriptions of masters. 2dly, The work out of which the demand arises is not that description of work which is within the statute; this was not a work done in the process of weaving or in the manufacture of cloth or woollen goods, but in the course of a process which appears to be preparatory to that of the weaver; therefore if this person can be considered within the act, all persons in any wise concerned in

in the wool trade, as dyers, &c. may bring themselves within it ; whereas it was intended, like the 1 *Ann. st. 2. c. 18. §. 4.* for labourers only. The debts demanded are also considerable, and in cases like the present may frequently subsist to a much larger amount : it is therefore not very probable that the legislature could have intended to withdraw such differences from their proper forum, and subject them to the summary jurisdiction of the magistrates. If left to the ordinary jurisdiction of a jury, the party will not be deprived of his set-off ; and this being a statute, which substitutes the oath of the party in lieu of the more regular proceeding of the common law, ought to be construed strictly.

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Holroyd and *Scarlett* contra, referred to the words of the act to shew that they were large enough to embrace this case. The title of it is “ an act for the better regulation of the woollen manufacture, and for preventing disputes among the persons *concerned therein* ;” and §. 5. extends not only to clothiers and makers of woollen goods and weavers, but expressly to “ other persons employed in such manufactures.” This process, as described in the affidavit, may fairly be considered as part of the woollen manufacture ; what is done to the wool is in the process towards the manufacture of the cloth, and it is immaterial whether it be done by the hand of the individual or by the machinery of a mill, the mill being only a substitution for the hand. Here then is a person falling within the express terms of the act, being “ a person employed in the woollen manufacture,” and this is a demand “ relating to work ;” consequently both come under the jurisdiction of the justices. No inconvenience will result to the parties grieved from this construction, because

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because it is at their option whether or not they will subject themselves to this jurisdiction, for it must be on the application of the party grieved that satisfaction is to be adjudged; besides the decision of the magistrates is not final, for s. 6 gives an appeal to the quarter sessions. As to depriving the party of the benefit of a set-off, that inconvenience would equally arise in the case of workmen; and it is a mistake to suppose that the statute authorizes the justices to determine upon the oath of the parties themselves; it says that they shall examine upon oath; but it does not say that they shall examine the parties.

Lord ELLENBOROUGH C.J. The penal provisions of this act shew strongly that it is not applicable to the adjustment of debts between parties of equal rank in trade: the person who shall refuse, for the space of 10 days, to pay the costs and damages adjudged against him, is liable to be committed to the county gaol or house of correction. Looking at the words of the act I do not think they are susceptible of any doubt. The act recites “that disputes have arisen between clothiers and makers of woollen goods and the manufacturers employed by them, concerning the admeasurement and weight by which wool and other materials used in making up woollen goods have been delivered out to the workmen employed therein;” the act therefore clearly relates to cases where parcels of wool have been delivered out to the various workmen, in order to be worked up by them immediately after such delivery. The second section provides for the weight by which the wool is to be given out, and also for an ulterior process of the manufacture, by providing that the clothier shall receive
back

back the same by the same weight, without fraud or deceit, under a penalty. But how can he receive the same back by the same weight, in this instance, where it appears that by the scribbling the weight must be materially diminished? What, however, I found my opinion upon, is the very words of the 5th section, that “all disputes and demands relating to work, *wages*, or damages between any clothier or maker of woollen goods, &c., or any weaver or other person or persons employed in such manufacture, shall be heard and determined by two or more justices of the peace,” &c. “Wages,” I think, is the emphatical word denominating the character of the person who is to apply. There must exist the relation of a party to pay and a party to receive wages. But there is no pretence for saying that any thing under the denomination of wages subsists between these parties. “Wages” relates to the quantum of compensation, as if so much per week or month is agreed to be given for the labour of a person; “work” relates to the mode in which the labour is to be performed, as if it is to be done within a stipulated time; and “damages” relates to the malperformance of that work, which may form the subject of a claim by the master against the workman; so that all these are words expressing the relation of master and servant. And this view of the statute seems to be confirmed by reference to other acts, and especially the 14 Geo. 3. c. 25. which makes it an offence punishable with imprisonment, if the inferior class of workmen there enumerated do not return the implements of their trade entrusted to them by their employers. It appears to me, therefore, that this case is not within the comprehension of the act of parliament.

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LE BLANC J. The object of this statute was to take those cases, for which it provides, out of the ordinary jurisdiction of the courts of law, in matters of dispute between party and party; and to submit them to the consideration of the magistrates to determine in a summary way. The Court therefore must see clearly that this is a case which falls within the meaning of the act of parliament. It seems to me that there is considerable weight in the objection, that the preparing materials for making cloth was not a work within the intention of the legislature, when they passed this act. But the Court is not called upon to determine on that ground; because it is by no means clear that the legislature ever meant to subject the disputes between such parties as these to the summary jurisdiction of the magistrates. At the time when this act passed probably the work was done more, in the manner stated in the affidavit, by servants than it is at present: the habits of the trade have taken a different turn since that time: then the work was done by servants employed immediately under master workmen; but the same work is now done by masters employing servants under them; so that the work is now carried on between master and master. Upon the whole it appears to me that the Court cannot see clearly that these persons are objects within the comprehension of the act.

Per Curiam,

Rule discharged.

Topping applied for costs, and Lord *Ellenborough* said, that if a party chose to make an experimental motion on the construction of this act, the magistrates ought to have costs.

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The KING *against* The Justices of SUSSEX.Friday,
June 25th.

D'ORLY obtained a rule nisi in the last term for a certiorari to remove an order of sessions made by the justices of *Sussex*, upon an appeal between the inhabitants of the parish of *Billinghurst* and the inhabitants of the parish of *Slinfold*, touching the removal of *James Knight* and his family.

The affidavits on which the rule was obtained stated, that the appeal in question had been heard at the last *Michaelmas* sessions for the western division of the county of *Sussex*; when the order of removal was confirmed, subject to the opinion of this Court on a case to be stated. That a case had been accordingly drawn by counsel for the parish of *Billinghurst* in *November* last; which, however, was not approved of by the solicitor for the respondent parish of *Slinfold*, but although frequent applications were made to him, he would not state his objections. The case was afterwards settled by the Court at their *Epiphany* sessions, and a copy sent to the solicitor for the respondents, and he was again applied to to have the case set down for argument. This request he refused to comply with; but at the same time gave the solicitors for the appellants to understand that they need be under no apprehension, as he would consent to a certiorari issuing, without regarding whether the six months had expired or not. Under the impression that the certiorari would be consented to, the usual notice to the

A certiorari to remove an order of sessions confirming an order of removal by two justices, must be moved for within six calendar months after such order of sessions made, and six days notice of such motion must be given to the justices pursuant to 13 G. 2. c. 18. s. 5. notwithstanding the order of sessions was made subject to the opinion of this Court on a case to be stated, which case was afterwards stated, and settled by the justices at sessions.

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justices as required by stat. 13 *Geo. 2. c.18. s. 5.* had not been given.

Courthope, in shewing cause, referred to the statute; by which it is enacted, that “no certiorari shall be granted to remove any order, &c., unless it be applied for within six calendar months next after such order made, and unless it be proved that six days’ notice thereof in writing has been given to the justices.” Here neither of these requisitions has been complied with; neither the certiorari was applied for within six calendar months; nor has six days’ notice been given to the justices. In *Rex v. Justices of Glamorganshire (a)*, and in *R. v. Nicholls, H. 25 Geo. 3. (b)*, the six days’ notice was held to mean six days before the application for the rule to shew cause.

D’Oyly being now called upon by the Court to support the rule, admitted that it must be governed by the authorities cited, if the statute applied to this case; but he endeavoured to shew that it did not. The reason of the provision requiring the six days’ notice is expressly given in the act, viz. to the end that the justices may shew cause, if they shall think fit, against the granting such certiorari; but after the justices themselves have settled the case, and thereby expressed their desire to have it brought up, the reason does not apply; because it cannot be presumed that they would now think fit to oppose the certiorari. It is clear that the statute does not affect all proceedings: in *Rex v. Battams (c)* Lord *Kenyon* held

(a) 5 *T. R.* 279.(b) *Ib.* 281. n.(c) 1 *East*, 298.

that it did not apply to the removal of an indictment, but to summary proceedings only. Here after the case was settled below, it could no longer be deemed a summary proceeding.

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LORD ELLENBOROUGH C. J. The order of removal was in the first instance a summary proceeding; and the order of sessions thereupon was a revision of that which was originally a summary proceeding. I find nothing in the language of Lord *Kenyon*, on which an argument has been raised, to the contrary; it is not applicable to the present case. Admitting that the magistrates may have wished, at the time when they settled the case, to have it brought up, still there may be reasons why they might think fit to shew cause; and unless it can be shewn that it could serve no possible end to give them six days' notice, we cannot so presume. The statute appears to me imperative.

LE BLANC J. enquired if there was any instance of an order being removed upon a case reserved without six days' notice.

BAYLEY J. said that he was not aware of any instance where a certiorari had been granted, after the expiration of the six months, upon a case reserved; and that it was the settled practice to give the six days' notice.

Per Curiam,

Rule discharged.

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Saturday,
June 26th.The KING *against* The Company of Proprietors of
ROCHDALE WATERWORKS.

Where a company were empowered by act of parliament to lay under ground, through the streets of a town, main pipes for the conveyance of water, and the inhabitants with the company's consent to lay pipes communicating with such main pipes to their houses, paying to the company a rate for such privilege :
Held that the company were rateable to the poor in the parish where the main pipes lay in respect of those pipes, and the rates paid thereon.

THE Company of proprietors of *Rochdale Waterworks* were rated to the relief of the poor of the township of *Spotland*, in the county of *Lancaster*, for and in respect of the trunks and pipes, and other apparatus for the conveyance of water, belonging to the Company, situate and being fixed in the ground, in the township of *Spotland*, and the profits arising therefrom within the township. The sessions, upon appeal by the Company, confirmed this rate, subject to the opinion of this Court on the following case :

By an act passed in the 49th year of the king, intituled, " An act for the better supplying the inhabitants of the town of *Rochdale* and the neighbourhood with water," the appellants are incorporated and empowered, among other things, to lay under ground, in, through, and along the public streets, and common highways, in the township of *Spotland*, main pipes for the conveyance of water therein ; and the act authorizes the inhabitants of the said township, with the consent of the Company, to lay down leaden or other pipes, communicating with such main pipes, to their respective houses, paying to the Company such rate or rates for such privilege, and water, as shall be mutually agreed upon between them. In pursuance of this act divers such main pipes and branches are laid and used in the township, and divers of the inhabitants thereof pay such rates as aforesaid to the said Company. The overseers of the poor of the said township have made the said assessment for the relief of the poor, pursuant to the

statute

statute 43 *Eliz. c. 2.*, and have assessed the Company for the said pipes and rates. The appellants alledge that they are not "occupiers of lands" in the township, within the intent and meaning of the statute.

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J. Williams and *Coltman*, in support of the order of sessions, relied on *Rex v. The Corporation of Bath (a)*.

Scarlett contra, endeavoured to distinguish this case from *Rex v. Bath*, because here the Company had no reservoirs, as in that case, upon the land, but a mere licence to carry pipes through the lands of others; which in *Rex v. Bath* was not expressly held to be such an occupation of land as was rateable in the parish where the pipes were laid, though perhaps from the reasons given in that case for holding the corporation not rateable for the whole profits in the parish where the reservoirs lay, it may be inferred that the Court were of opinion that the corporation was rateable in respect of the pipes in the other parishes. But here again another distinction is observable; for this act not only authorizes the Company to lay main pipes, but the inhabitants also to lay pipes communicating to their respective dwellings; and it appears that they have done this; so that this property ought to be assessed by rating the inhabitants of each house as an occupier of land, pro tanto, according to the extent of the conducting pipe, or in respect of his house increased in value by the supply of water.

LORD ELLENBOROUGH C. J. Whether the occupiers of the houses are or are not rateable in respect of the

(a) 14 *East*, 607.

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advantages derived to them from the use of these collateral pipes, does not affect the present question. The question here is, whether the Company, as occupiers of the main pipes, are rateable. What difference does it make whether it be a reservoir of so many feet square, or a pipe of so many inches in diameter? I own I cannot distinguish this case from *Rex v. The Corporation of Bath*.

LE BLANC J. If this rate on the Company had been simply on the leaders which carry the water to each house, the argument might have been of weight; but the rate is imposed in respect of the main pipes and the profits arising from them.

Per Curiam,

Order of sessions confirmed.

Saturday,
June 26th.

The KING *against* The Inhabitants of WHITLEY
LOWER.

Upon appeal against an order of removal the declarations of a rated inhabitant of the appellant parish are evidence against that parish, without calling the inhabitant and shewing that he refused to be examined.

THE court of quarter sessions for the West Riding of *Yorkshire* discharged an order of two justices for the removal of *Sarah*, the wife of *John Swallow*, and their children, from the township of *Whitley Lower* to the township of *Emley*, subject to the opinion of this Court on the following case:

John Swallow, (who is since dead) served one *Jagger* as a collier for a year, in the township of *Emley*. To prove the terms of the hiring under which the service had taken place, the counsel for the respondents proposed to give in evidence declarations of *Jagger* the master, made in a conversation with the deceased (*Swal-*

low) about a new hiring; *Jagger* being then and now a rated inhabitant of *Emley*, the appellant township. It was objected on the part of the appellants, that such declarations were not admissible, unless *Jagger* himself was first called by the respondents, and should then refuse to be examined, or should be proved to have previously refused to give evidence. The sessions allowed the objection.

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Holroyd and *Stavely*, in support of the order of sessions, admitted that in *Rex v. Hardwick* (a), the declarations of a rated inhabitant were held admissible on the ground of his being a party to the suit; but they observed that there it appeared that the party had refused to be examined; non constat, but that if this party had been called he might have given the evidence required.

LORD ELLENBOROUGH C. J. If the argument be good for any thing it must apply generally, and it would then be an universal rule that the party must be called, before his declarations can be admitted in evidence. All the rated parishioners are considered as parties to the appeal, and therefore their declarations are evidence; if what they have said is mere idle conversation it will have but little weight.

The Court quashed the order of sessions, and remitted the case back to be re-heard and the evidence received.

Scarlett was against the order of sessions.

(a) 11 East, 578.

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Tuesday,
June 29th.

RIMMER *against* GREEN.

Bail attending
to justify are
entitled to pro-
tection from
arrest on mesne
process.

READER shewed cause against a rule for discharging the defendant out of custody of the sheriff of *Middlesex*, as to this action, he having been arrested during his attendance in court to justify as bail in a cause depending in this court. The affidavit stated that he attended to justify and did justify; and that during his attendance and before he was called in to justify he was arrested on the stairs leading to the court, at the suit of the plaintiff.

It was admitted that if the case of *Meekins. v. Smith (a)*, on which the rule was obtained, could not be disputed, that the rule must be absolute; and the Court declared that they recognized that case, and made the rule absolute upon an undertaking of the defendant not to bring any action.

(a) 1 H. Bl. 636.

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PITT *against* DONOVAN.Tuesday,
June 29th.

ACTION for slander of title. The plaintiff declared in the first count that he was seised of and interested in certain lands, &c. at *Bromesborough*, in the county of *Gloucester*, for the life of *W. H. Y.*, subject to certain mortgages and terms of years, and also seised of and entitled to the reversion in fee of the same premises, subject to an annuity of 500*l.* to the wife of *W. H. Y.* for life, in case she survived her husband, and to a term of years to secure the same, and subject also to certain limitations in trust for the benefit of such children of *W. H. Y.* and his said wife as they should by deed appoint, &c., and that *W. H. Y.* and his wife had no children living, and that the plaintiff was so interested under and by virtue of a sale made to him of such lands by the said *W. H. Y.*; that the plaintiff had contracted with one *Barton* to sell and convey to him such lands, &c. for 30,000*l.*, and that *Barton* was willing to accept the title of the plaintiff and to complete the contract, but that the defendant knowing the premises, but unlawfully and maliciously devising and intending to scandalize the right and title of the plaintiff to such lands, &c. and to hinder and prejudice him in the sale, and to deter and prevent *Barton* from completing the contract, unlawfully and maliciously wrote and published certain false, scandalous, and malicious libels of and concerning the right and title of the plaintiff to the lands, (that is to

In an action for slander of title conveyed in a letter, to a person about to purchase the estate of plaintiff, imputing insanity to *Y.*, from whom the plaintiff purchased it and that the title would therefore be disputed, per quod the person refused to complete the purchase: Held that the defendant, who had married the sister of *Y.*, who was heir at law to her brother, in the event of his dying without issue, was not to be considered as a mere stranger; and that the question for the jury was not whether they were satisfied as men of good sense and good understanding that *Y.* was insane, or that the defendant entertained a persuasion that

he was insane, upon such grounds as would have persuaded a man of sound sense and knowledge of business; but whether he acted *bonâ fide* in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget.

say)

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say) one dated the 18th of *December* 1812, in the form of a letter to *Barton*, to the tenor following;

“ Sir,

“ I understand you have become the purchaser of the estates of *W. H. Y.* Esq., at *Bromesberrow*, in the county of *Gloucester*. I cannot but presume that the candour as well as justice of Mr. *Pitt*, of *Cirencester*, of whom you have purchased them, has induced him to inform you that I have given him notice, in writing, that his title to those estates will hereafter sooner or later be contested. I am a trustee of those estates for certain purposes, and it is my duty to inform you that at the time they were sold Mr. *Y.* was not in a state of soundness and competency to enable him to do so; and that the sale itself was conducted under circumstances so mysterious and extraordinary as to require an explanation in a court of justice.

(Signed) “ *R. Donovan.*”

The count then set out another libel written and published by the defendant on the 30th of *December* to the tenor following; “ Without following the subject more minutely I will venture to say that I have it in my power to prove a thousand acts of decided insanity in his (meaning the said *W. H. Y.*’s) case, on which neither you nor Mr. *Barton* would have a shade of doubt.” There were other counts varying these charges, and the declaration concluded “ by reason of which said several premises the plaintiff hath been and is delayed, injured, and prejudiced in the sale of the said lands, &c. to *Barton*, and hath been delayed and hindered in and from receiving divers large sums of money from *Barton* for the same, and *Barton* hath been and is deterred and prevented from carrying into effect and completing the treaty of sale between himself and the plaintiff, which he intended

intended to do and otherwise would have done." Plea general issue.

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At the trial before *Graham B.* at the last *Lent* assizes for the county of *Gloucester*, the material allegations in the declaration were proved, as to the plaintiff's title, the contract entered into with *Barton* for the sale of this estate, and the publication of the two writings charged to be libels, the latter of which was an extract of a letter written to *Barton's* solicitor; and it was proved that in consequence of the receipt of these letters *Barton* declined the purchase. It further appeared that the plaintiff and the defendant were both gentlemen residing in the county; that the defendant, who was a barrister, but had retired from the profession, was a trustee under the marriage settlement of Mr. *W. H. Y.*, and had married his sister; that under the marriage settlement a term of years in this estate was vested in the defendant as trustee for securing to Mrs. *Y.* her jointure, and that the defendant's wife was heir at law to her brother *Y.* in the event of his dying without issue.

The rest of the evidence was addressed to an inquiry into the sanity of Mr. *W. H. Y.*; the evidence on the part of the plaintiff, consisting of a detail of family and other transactions, in which that gentleman had been engaged since the period of his coming of age, about the year 1799, all tending to shew him competent to the management of his affairs; and general evidence was given of his sanity, by the examination of persons who were acquainted with him, as to their judgment upon that subject; who proved, however, at the same time, that he was a man of a disposition and habits of life most eccentric. It was also proved that the defendant himself had, on a variety of occasions, commencing about

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about 1803, and continuing down to 1807, been engaged for Mr. T. in drawing, settling, and ingrossing his leases to the tenants, and attesting their execution. This was met, on the part of the defendant, by proof of a multitude of extravagances and eccentricities committed by Mr. T. from his youth up, both in the common and the more serious concerns of life, tending to shew that there was enough to justify a suspicion at least of his want of sound intellect, and there was evidence that some members of Mr. T.'s family had been affected with insanity, and had died under that disorder, and witnesses also spoke to their judgment of his incompetency. After an investigation of many hours the learned Judge left the question to the jury upon the evidence, stating to them, in the course of his summing up, that in order to maintain the action some malice must be fixed on the defendant, that is, the action must be injurious and proceeding from an improper motive; that if the evidence satisfied them, as men of good sense and good understanding, that Mr. T. was insane, or if the defendant entertained a persuasion that he was insane upon such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to a verdict.

The jury found a verdict for the plaintiff, damages 40s.; whereupon a rule nisi was obtained in the last term for a new trial, on the ground of a misdirection.

Dauncey, Abbott, and Puller now shewed cause, and contended, upon the report, that the facts and circumstances disclosed in it warranted the verdict, and therefore there could not be any reason, in justice, for disturbing it; that the defendant was not within the rule

laid down in *Sir G. Gerard v. Dickenson* (a) that a party shall be protected in what he says of the title of another, provided he himself lays claim to the same; because here the defendant, though a trustee for some purposes to this estate, was in the legal sense a mere stranger to it, and therefore shall have no more protection than a mere stranger. And according to *Hargrave v. Le Breton* (b), and *Smith v. Spooner* (c), it seems that the plaintiff must prove malice; but that such malice may be implied, where the words spoken or written are untrue, and where the speaker or writer claims no title. As to the misdirection, the substance of the issue was correctly stated to the jury, though perhaps every observation may not have been critically correct; what was stated as to the malice, was correct; and as to the rest, it cannot be contended that the law will allow the defendant to make a communication that is injurious to another, unless he shall at least satisfy the jury that he believed the communication to be true; and the substance of the direction upon this point was, whether a man of sense and discretion, such as the defendant must be taken to be, could really be supposed to believe it.

The Attorney-General, Jervis, and W. E. Taunton, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. I think there is no necessity for troubling the other side on this occasion, for in this matter I cannot help thinking that the point which was peculiarly for the consideration of the jury, and on the event of which this case ought to depend,

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(a) 4 Rep. 18.

(b) 4 Burr. 2422.

(c) 3 Taunt. 246.

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was not left to them correctly, and that it ought, therefore, to be presented to the consideration of another jury; and that point is, whether the defendant made the statement *bonâ fide*, and under an honest impression of its being the truth, or whether he made it maliciously, and for the purpose of flandering the title of the person that was about to convey his estate. Now that has not been precisely and simply stated to the jury; and really under such a mass of evidence, and after a contention between the parties of so many hours, on the one side, that the sanity of the person was complete, as if the issue had been on a *devifavit vel non*, and on the other, that the defendant had probable cause for believing what he stated, which was not strictly the issue, I am not surprised that the learned Judge's attention, distracted between the two, was less correct than it otherwise would have been; and particularly under such fatigue of body, which sometimes impairs the mind, and prevents it from fully discharging its duty and exerting its energy; so that the very point on which alone this question turned, was not presented to the jury by the learned Judge as it ought to have been. He has given us the terms on which he left it to them, "that they were to consider the question and to judge on the whole of the evidence."—No doubt of that.—"That the gist of the action was malice."—Undoubtedly it was so.—"Not malice in the worst sense, but it was enough that the act done was wrongful, and done under circumstances that marked an intention to do an injury; and that would depend, not on the circumstance, whether he believed it to be true, but whether his belief was such as a man of sound mind, or a man of sense and knowledge of business would have formed."

formed." Now that is what he was not justified in saying, for with reference to the competency or incompetency of Mr. Y., certainly the question in this cause does not depend on that; for if what the defendant has written be most untrue, but nevertheless he believed it, if he was acting under the most vicious of judgments, yet if he exercised that judgment *bonâ fide*, it will be a justification to him in this case. Whether his belief be such as a man of sound sense and knowledge of business would have formed is not the question; the opinion which a rational man would have formed on such a subject might be that Mr. Y. was competent; but the jury must arrive at their conclusion in this case, through the medium of malice or no malice in the defendant. In that way it might have been left to them, not if you think that no man of a rational understanding would come to such a conclusion, but you will say whether you think this defendant, with such an understanding as he possesses, did *bonâ fide* arrive at the conclusion which he has stated, or whether he did not use it as a mere pretence, colour, and cloak for his malice. That would have been the way, without putting it on the rationality of the defendant's conclusion; because, from the latter mode of considering it, the jury might have been led to say to themselves, we do not believe, as men of rationality and ordinary understanding, that this person was insane; and taking the defendant to be a man of rationality also, we therefore think he must have been actuated by malice. This might have prevented them from drawing any other conclusion; whereas the learned Judge ought to have embodied in his proposition to the jury, whether under all the circumstances the defendant acted *bonâ fide*,

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considering the prejudice, the passion, the eagerness to complain, and the character and situation of this defendant. I am aware there were circumstances in the antecedent conduct of the defendant fit to be left to the jury, from which they might have inferred malice; his acting in the execution of deeds and the like, at a former period of his life, with this gentleman, might have been strong evidence as to whether the defendant believed him to be insane; but that was not the question left to the jury specifically, but whether a man of sound mind and knowledge of business would have formed the conclusion which the defendant formed. And this was not the accidental expression of the learned Judge, but he repeats in the very last sentence to the jury, that they were to say from the whole evidence if they thought a man of sense could seriously believe Mr. Y. to be insane, or incapable of transacting business. Now that is not the way to put the question; for it is most important that it should be understood that this defendant, who was connected with the property of this gentleman, and was in the expectation, and probably entertained some hopes of seeing it realized, that his family would succeed to the estate, for if Mr. Y. died without children the estate would come to the defendant's wife, and therefore he was interested in seeing that his family was not cut off by any improper act or contract of this person; it is most important, I say, under these circumstances, that the defendant should have a right to correspond with the party who was about to become a purchaser, and have free liberty of stating difficulties and propounding his objections to the title, as in the case of *Gerard v. Dickenson* and other cases not stronger than the present; a liberty which is not allowed to a

mere stranger, according to the rule in *Jenk. Cent. rei immiscet se alienæ* (a). But it is impossible to treat this defendant as a stranger: he was indeed a stranger as to any vested interest, but he had an interest in probable expectation so as to induce him to bestir himself and look about lest an improper conveyance should be made injurious to his right; and whether he thought that such conveyances would or would not be valid when made, he had a right to see that they should not stand in his way; for even if they were invalid, they might yet be an impediment to him. The question then distinctly and substantively is, whether in the communication which he made he acted *bonâ fide*. I am aware that there are many things reprehensible in the letters, but they are no slander of the title, if he believed them. They contain disrespectful and improper passages, such as may perhaps be libellous on the person of the party whom they concern, but they are rather a confirmation of his belief that there was an objection existing against the man on the ground of his incompetency to do the act, and that it was proper to make it to the person with whom he was corresponding. I should be very sorry if it were supposed from the result of this motion, that there is the least imputation on the gentleman who is the plaintiff in this cause. There is not any ground for saying that he has conducted himself with any view to his own interest in this transaction; on the contrary, he has conducted himself rather delicately and nicely. But the question does not turn upon his conduct; and this is a case, the decision of which is to govern other cases where the question of slander

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(a) 247. pl. 36.

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of title may occur; in which case the bona fides of the communication, and not whether a man of rational understanding would have done so and so, is the question to be canvassed. A man of intemperate passions, or of weak understanding, or a man acting under an erroneous impression, may be carried further than a man of more mature judgment; but still he would not be liable to an action of slander of this sort. I am sure that the vast length of time which this cause occupied at the trial must have produced a fatigue of body and mind which overshadowed the direction. I have no doubt that if it had been tried in two instead of twenty-four hours, the result would have been different as to the direction. As it now stands, it appears to me, with the highest respect for the learned Judge, that the case was not left correctly to the jury, and that their verdict may have been founded on an improper impression of what was the question for their consideration.

BAYLEY J. (a) I am of the same opinion. It seems to me, that the question for the consideration of the jury was, whether the defendant really believed that which he made the subject of his communication. I have no difficulty in saying, that the defendant is not to be regarded as a mere stranger in this case. I think that he had not only a right, but, if he believed it to be true, that he was called upon to make the communication; for if at any subsequent time Mr. T. should die without issue, and afterwards the defendant should bring an ejectment to try

(a) *Le Blanc* J. had left the court.

the sanity of this gentleman, it would afford matter for strong observation against him, that he had suffered *Burton* to complete the purchase of this estate and to pay his money for it, without communicating to him^a that his title would be disputed. I think, therefore, that if the defendant really believed this contract to be void for the want of sanity in *Y.*, it was not only his right but his duty to make the communication. Then where a person who is not to be treated as a mere stranger is sued in an action of this kind, two things are to be made out; first, that there is a want of probable cause; and secondly, that the party who made the communication acted maliciously. Now whether a party acted maliciously depends upon his own motives and on the view which the jury entertained of the mind of the party himself; and we cannot try what are the motives and feelings of particular men's minds by referring to the mind of some one other person; therefore if we refer to a mind that is sensible and reasonable, and which does not judge under the same pressure, as the mind of the person in question might do, and make that sensible and reasonable mind the standard by which to judge of the state of mind of the person who is under that pressure, we shall be referring to an improper rule to judge by. The question here is not what judgment a sensible and reasonable man would have formed in this case, but whether the defendant did or did not entertain the opinion he communicated. I forbear to give any opinion on the weight of evidence, but the short question is, whether the defendant acted *bonâ fide*. That was the question for the jury to decide, but was not left to them in that form; that is, whether he acted maliciously or not. I therefore feel myself bound to say that there ought to be a new trial.

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DAMPIER J. I am of the same opinion. The point on which the question turns has not been precisely and correctly presented to the jury. I cannot bring myself to view the defendant, when he entered upon this subject, in the light of a stranger. In all points in which he appears, whether it be in his connection with the family, in his profession, or in his connection with the property, he seems to me to be very far from being a stranger to Mr. Y. or to his estate; and therefore he is entitled to that favourable construction of his conduct which a person is entitled to by the law of this land, who mixes himself in matters in which he has an interest. As to the want of probable cause, in order to fix the defendant in this action, it must be made out not merely by the fact itself, but by all the circumstances of the case, that there was such a want of probable cause, as would induce a jury to infer that his conduct was founded in malice; that is, such a want of probable cause, as that a party in the situation of the defendant, must be taken to have acted maliciously, not merely with a view to his own benefit, but with a view to the detriment of the party who purchased this estate from Mr. Y. Now if it has been left to the jury to say whether a person of a sound mind and knowledge of business would have formed such an opinion as that which the defendant has expressed, I am of opinion it has been incorrectly left to them. For where the party complained of has an interest, as far as that interest goes, it frequently subtracts from the judgment, and prevents that cool discussion which is requisite for forming a correct judgment, and clouds it with the prejudice which interest brings with it. In the first place then, the habits and temper of the party are to be considered in forming an estimate of his judgment; then

come,

come, the concern he has with the estate ; the desire he has to look to the interest of his family ; the connection he has had with the party on whose state of mind he writes ; the frequent opportunities which he has had of judging on that subject, and which he may think have given him better means of forming his opinion upon the state of that person's mind from the conduct of it, than others can have : these are all qualifications of the general proposition to which this question has been referred, and should have been left to the jury as points for them to consider ; for all these, or some of these, might have operated in making up their judgment of what was passing in the mind of the defendant. The question is not what a sensible dispassionate man would believe concerning the soundness of Mr. Y.'s intellect ; but what a person under the influence of those motives which might have governed the conduct of the defendant would have believed ; what was the motive which influenced him ; whether his conduct was such as warranted the jury in inferring malice. It seems to me that the question has not been so left to the jury, and therefore has not been left to them as it ought ; consequently there must be a new trial.

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Rule absolute.

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Wednesday,
June 30th.

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The lessee of all those fishings of the halves and halvendoles, with the appurtenants to the halves due and accustomed within the river *Severn*, between certain limits within a manor bordering on the said river, and of all royal fishes taken between the said limits, put and wheel fishing excepted, under an annual rent, is liable to be rated to the poor for such fishery.

THE defendant was rated to the relief of the poor of the parish of *Westbury*, upon *Severn*, in the county of *Gloucester*, under the following assessment :

“ *Ellis*, Mr.—for the fishery—5s.”

Against which rate he appealed to the quarter sessions, who confirmed the rate, subject to the opinion of this Court on the following case :

By letters patent, dated the 24th of *September*, 1 Car. 1. 1625, under the great seal of *England* and the seal of the dutchy of *Lancaster*, and also by letters patent under the privy seal, his said majesty did give and grant to *Robert Lord Carye*, and *Henry Carye* Knt., son and heir apparent of the said *Robert Lord Carye*, and their heirs for ever (inter alia), the manor of *Rodley*, in the county of *Gloucester*, with all its rights, members, and appurtenances, and house or court called the *Bury Court-house*, within the manor of *Rodley*, and all lands, &c. thereto belonging, and all that our fishery of the halves and halvendoles, with the fishings called *Unlawater*, with the appurtenants to the halves due and accustomed within the river of *Severn*, in the said county of *Gloucester*, with all royal fishes there to be taken, now or late in the tenure or occupation of *Edward Ashfield* Knt., or his assigns, by particular thereof mentioned to be of the yearly rent or value of 11l., which manor and premises together are mentioned to be of the rent or value of 48l. 10s. 7½d., and to be parcel of the lands and possessions of the dutchy of *Lancaster*, and all messuages, lands, rivers, gulfs, banks, rivulets, pools, waters, watercourses, aqueducts, fisheries, fishing

fishings places, &c. within or belonging to the said manor, tenements, hereditaments, and premises, and all rents reserved on demises or grants; to hold of the said king, his heirs and successors, as of his manor of *Enfield*, in the county of *Middlesex*, by fealty only, in free and common socage, rendering the rent of 48*l.* 10*s.* 7½*d.* into the hands of the receiver-general of the said king, his heirs and successors in the duchy of *Lancaster* for the time being, at the times and in manner therein mentioned, and further as in the said letters patent is more particularly stated.

By indenture, 22d *November*, 8 *Car. I.* 1632, *Robert Earl of Monmouth*, and *Henry Lord Carye*, his son and heir apparent, granted in fee to *John Young* and several others, and their heirs, the said manor of *Rodley*, fisheries and premises, in the said county of *Gloucester*, mentioned in the said letters patent.

By indenture, 26th *June*, 9 *Car. I.* 1633, the said *Young* and others demised to *Thomas Rusb* for 1000 years from the 24th of *June* then last past, one-fourth part of all those fishings of the halves and halvendoles and of the fishing called *Unlawater*, with the appurtenants to the halves due and accustomed within the river of *Severn*, in the said county of *Gloucester*, from a certain bay or pill within the manor or lordship of *Rodley*, in the county aforesaid, commonly called *Newnham's Pill*, unto a certain place in the lordship of *Rodley* aforesaid opposite to *Epney's Weare*, in the said county of *Gloucester*, and also a fourth part of all royal fishes to be taken between the said bay or pill and the said place opposite to *Epney's Weare* as aforesaid, put fishing and wheel fishing in the said river *Severn*, excepted out of this grant, under the yearly rent of one penny during four years of the said term

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term next ensuing, payable to the said *Young*, his heirs or assigns, on a day therein mentioned; and during the residue of the said term of 1000 years under the annual rent or sum of fifty-and-five shillings, at the days and in manner therein mentioned.

The appellant, and five other persons whose shares he rents, are the owners of the said fourth part of the said fishery and premises comprised in the indenture of the 26th *June* 1633 for the remainder of the term of 1000 years, and also of the three other 4th parts thereof derivatively from the said *Young* and others for three respective terms of 1000 years, and the appellant is the occupier of all the four parts. This fishery is in the parish of *Westbury-upon-Severn*, and tithes from it have been and still continue to be paid to the vicar of *Westbury-upon-Severn*. The appellant, and those under whom he claims the fishery, have from the time of the demise of the respective parts thereof, exercised the sole right of fishing in the part of the river comprised in the demise, except the put fishing and wheel fishing, which have been carried on during the same period by persons who rented under *John Colchester Esq.* and others at 1s. per putt in the following manner: the putts are ozier baskets, six feet in diameter at the mouth, attached to stakes driven into the bed of the river, united by wattle, and which stakes are repaired from time to time as they become decayed. All sorts of fish are caught in these putts, but chiefly small fish, not above two salmon in a year. When sturgeon have happened to be taken in the putts they were always claimed by and taken to Sir *William Guise*, the lord of the manor. These putts were destroyed about 10 or 11 years ago by the trowmen as a nuisance to the navigation of the river. The appellant

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in the exercise of his right of fishing generally uses nets, which the fishermen land on the beach or bed of the river, varying the situation as the current of the river changes by the shifting of the sand; and sometimes they affix one end of the net to a poll stuck into the bed of the river. Out of flood-mark, at one place opposite the fishery comprised in the demises aforesaid, is a fish-house built by the appellant's grandfather about 32 years ago, on the waste of Sir *William Guise*, as lord of the manor of *Rodley*, and it has been used and occupied ever since by the appellant, and those under whom he claims such fishery, together with the said fishery, for the accommodation of the fishermen whenever the course of the river sets that way, which it has not done for the last two years. Before the above mentioned house was built, those under whom the appellant claims occupied in the same manner another house belonging to one *Hawkins*. The appellant, six or seven years ago, purchased a piece of pasture land adjoining the river *Severn*, in the parish of *Westbury*, which he lets, reserving to himself the right of drying nets there, and his tenant pays the poor rates in respect of the land. In 1799 there was a presentment in the manor court of *Rodley* for a crib erected on the waste of the manor, and running into the river on the part adjoining one of the fisheries belonging to the appellant and the five other persons before stated, so that part of it is overflowed at ordinary tides and the whole at high tides. The appellant does not reside in the parish of *Westbury*. The question for the opinion of the Court is, whether the appellant is liable to be rated to the relief of the poor in respect of the property so occupied by him in the parish of *Westbury* as aforesaid.

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Holroyd and *Abbott*, in support of the order of sessions, contended that he was liable. They argued from the terms of the original grant of *Charles* the 1st, that the soil passed to the grantees, for the reasons, as far as they apply, afterwards urged in support of the same argument upon the grant of 1633; and also because in the original grant the fishery was stated to be in the tenure and occupation of a tenant, which implies something territorial that is capable of occupation, and more than a bare privilege of taking fish; and besides, the deed conveys all the banks, rivulets, fisheries, and fishing places, &c. within the manor. The only question then is, what was intended to be conveyed by the demise for 1000 years made in 1633 to *Rush*, under whom the appellant claims. The lessors, as it has been shewn, were clearly entitled to the soil, and they demise one-fourth part of the fishings of the halves and halvendoles, and of the fishings called *Unlawwater* (in the terms of the original grant) under a yearly rent of 1*d.* for the four first years, and of 55*s.* for the remainder of the term. Now it may be observed, in the first place, that the very term “halves and halvendoles,” probably denotes a conveyance of the soil. It is a term signifying the right which exists by the custom of the country in the lords of the manor of *Barclay*, and other manors, lying on the *Severn*, that the river *usque ad filum aquæ* is the common boundary, and parcel of those manors on either side of the river. This right was established upon a trial at bar in the Exchequer, reported by Lord *Hale* (a), at which he says he attended, and was thoroughly acquainted with the case, and that it was most satisfactorily made out, “and that the lands are

(a) 1 *Ld. Hale de Jure Maris*, pars 1ma. cap. 6. 1 *Hargrave's Law Tracts*, 34.

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enjoyed by the Lord *Barclay* and his farmers quietly and without the least pretence of question to this day." Halves and halvendoles then are words including the soil itself, i. e. this right of the lord over one half of the stream; and therefore the soil shall pass by the grant of them. But farther, this is a demise of all the fishings; and if a man grant all his woods, it passes the soil (a); and so it seems to be the better opinion, that by the grant of a piscary, or separalis piscaria, the soil shall pass (b), though Lord *Coke* differs from that opinion (c). It is true there is an exception out of this grant of put and wheel fishing, but nevertheless it may be a several fishery; for that does not necessarily mean an exclusive fishery, but only one over which no other person has a co-extensive right with the grantee: and so it was ruled in *Seymour v. Lord Courtenay* (d): on the other hand, the exception shews that the whole interest of the grantors in the fishery passed, saving to them this partial use in the soil of put and wheel fishing. But admitting this grant of fishery to be in itself equivocal as to the passing the soil, the reservation of rent makes clear what might otherwise have remained doubtful on that head; because a rent necessarily imports that there is something manurable out of which it is to issue, and to which the party may have recourse to distrain (e); which cannot be by the grant of a mere incorporeal right. Another circumstance, which, according to Lord *Hale*, affords an evidence that the soil of the river was parcel of the manor, and consequently passed to the lessees, is the demise of one fourth of all royal fishes. Lord *Hale* says, "He that hath wreck of

(a) *Co. Lit.* 4. b.(b) *Plowd.* 154. a. 2 *Salk.* 637. per *Holt C. J.* in *Smith v. Kemp.*(c) *Co. Lit.* 4. b.(d) 5 *Burr.* 2814.(e) *Co. Lit.* 47. a. 144. a.

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the sea, or royal fish by prescription *infra manerium*, it is a great presumption that the shore is part of the manor, as otherwise he could not have them (a).” And for the same reason, if he grant the fish to another, the presumption is that he grants the shore also. And this is farther evidenced by the manner in which the right has uniformly been exercised, which is stated to be by landing the nets upon different parts of the beach, and occasionally affixing the end of the net to a pole stuck into the bed of the river. At all events, if it be only doubtful on the face of this grant whether the soil passed, the rule is that it shall be construed most beneficially for the grantees; and though the soil did not pass, still it seems that if a man grant a fishery, or if he grant *vesturam* or *herbagium terræ*, the grantee shall have a particular right in the land (b); and that is enough to sustain this rate.

W. E. Taunton and Campbell, contra, admitted that the soil passed to the grantees under the deed of 1625, but denied that it did so by that of 1633, which was not co-extensive with the former deed. The position cited from *Plowd.* is only stated *arguendo*, and with an *ut videtur*, and it is not warranted by the year-book, 40 *Edw.* 3. f. 44. which is referred to in support of it. No judgment is there stated, nor any grant set out; and the position is admitted to be contrary to the authority of Lord *Coke*. Perhaps to inquire what passes by a grant of fishery or several fishery, is still *vexata quæstio*. In the case of the fishing of *Banne* (c) it is stated, “that the city of *London* had a grant from the crown of the river *Thames*, but because it was conceived

(a) *Hale de Jure Maris*, pars 1ma. cap. 6. & *Hargrave's Law Tracts*, 27.

(b) *Co. Litt.* 4. b.

(c) *Davis*, 56.

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that the soil and ground of the river did not pass by such grant, they purchased a new grant including the soil and ground of the river." But whatever may be the general import of a grant of fishery is foreign to this case; because by the exception, out of this grant, of put and wheel fishing, the whole soil was expressly excepted, and reserved to the grantors, and not a partial use only, as contended for on the other side. Lord *Hale*, in his treatise *de Jure Maris* (a), divides fishing into two kinds, viz. with the net, which he says may be either a liberty without the soil, or in concomitance with the soil; or otherwise it is a local fishing that ariseth from the propriety of the soil: such are gurgites, weares, fishing places, borachixæ, stachixæ, &c. which are the very soil itself. As to the rule that a rent cannot be reserved out of an incorporeal inheritance, it must be taken with some qualification. In *Co. Lit.* 47. a. it is said that if it be reserved on a lease by deed for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot, neither shall it pass with the grant of the reversion. But this seems contrary to *The Dean and Chapter of Windsor v. Gover* (b), where upon a lease of tithes for 21 years, reserving an annual payment, the Court inclined that it was a rent, which would go with the reversion. And *Saunders* cited *Dubytofte v. Courteene* (c), and *Valentine v. Denton* (d) to the same effect; and so are the cases of *Dalston v. Reeve* (e), and *Tripping v. Grocer* (f). This point, however, received a more solemn decision in *Balby v. Wells* (g), in which covenant was held to lie by a rector upon a lease for years of tithes against the assignee of

(a) 1 *Harg. Law Tracts*, 18.(b) 2 *Saund.* 304.(c) *Cro. Jac.* 453.(d) *Ibid.* 111.(e) 1 *Id.* *Ray.* 77.(f) *Sir T. Ray.* 18.(g) 3 *Wils.* 25. and *Wilmot's Judgment*, S. C.

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his lessee. From these cases it seems clear that a rent may be reserved out of an incorporeal hereditament, and that it will go along with the reversion: therefore the conclusion, that because a rent is here reserved, the soil must of necessity be taken to pass, is by no means a correct one. As to the royal fish, according to Lord *Hale* (a), this perquisite may be had in gross as well as appurtenant to a manor; and here the presumption is, that it was in gross, because the lord of the manor always claimed and took the sturgeon, which indicates that he was owner of the soil. The exposition of the term “halves and halvendoles” is ingenious, but it probably means nothing more than a designatio loci within the river where the fishery lay. But it is said that the enjoyment under this grant by using the banks and bed of the river is evidence of the right; which is not denied: but the question is what right; whether an absolute dominion in the soil, or only that right which is the more natural, and is incident to every grant, viz. that of using whatever is necessary for the enjoyment of the thing granted, according to the maxim *quando lex aliquid alicui concedit, concedere videtur & id, sine quo res ipsa esse non potest* (b). Therefore if one grant all his trees growing in his woods the grantee may cut them down, and carry them through the land, for without this the grantee cannot have them, nor make a profit of them. So if one sell all his fishes in his pond, the vendee may well justify for the coming to the banks to fish, for without this he cannot take them by any means (c). In like manner the exercise in this case is referable to the right incident to the principal thing, without which the party could not have it, and not to the

(a) 1 *Hargrave's Law Tracts*, 44.
(c) *Plowd.* 16.

(b) *Co. Lit.* 56. a. 153. a.

thing itself. It is in the nature of an easement in the soil of another, which like the waggon way in *Rex v. Jolliffe* (a) is not rateable. Upon the whole therefore it is submitted that there is no reason for holding that the soil passed by the lease of 1633.

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LORD ELLENBOROUGH C. J. This case has been argued with great industry and learning; and the Court cannot but feel obliged to the gentlemen who have argued it, for the pains which has produced so much learning; but after all, I confess my opinion remains much the same as it was at the conclusion of the argument in support of the rate. The rate has been confirmed by the sessions; we must therefore see that they have done wrong, before we determine that their adjudication ought to be quashed. I will not assume that a fishery, as an incorporeal hereditament, is the subject of a rate. The question then is, whether there be any land connected with this fishery so as to be the subject of rate. What is the thing granted? In 1625 the king grants "all that our fishery of the halves and halvendoles with the fishings called *Unlawater*, with the appurtenances to the halves due and accustomed." I could have wished that the sessions had explained to us, if any lights were afforded by the evidence, the meaning of the term "halves and halvendoles," which is not very familiar to us. It has been treated in argument as if it related to half of the river, and the grant being "with the appurtenances to the halves due and accustomed," is in favour of the construction of the half ad filum aquæ; which according to Lord *Hale* belongs by the constant custom of that country to the lords of the

(a) 2 T. R. 90.

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manors on either side the river; in support of which custom he cites the lord *Barclay's* case. The case is an extremely curious one, not only as comprehending a custom affecting a whole district of manors, but as it shews in what view evidence in support of such a custom, as it was admitted in the *Duchess of Somerset's* case (a) and other cases, ought to be received. I have always thought that this case of Lord *Hale* threw light upon the nature of this evidence, and shewed that it is to be considered rather as evidence of a custom pervading one common district of manors, than as the custom of one manor to shew the custom of another. Perhaps therefore if this custom be adverted to, it may explain a little the meaning of the term halves and halvendoles; but whatever its meaning may be, I think from the grant of "the fishings with the appurtenants to the halves due and accustomed," it appears distinctly that these halves and halvendoles are of the nature of land, or some local limit within which the fishery connected with the soil is to be exercised. I cannot consider it otherwise than as a grant of something territorial. There are also these farther words, "all royal fishes there to be taken." The like expressions occur in the second grant; from all which an argument has been drawn from Lord *Hale's* treatise, who speaks of it as a great presumption that the shore is parcel of such manors as by prescription have royal fish, otherwise they could not have them: and it is argued that here the grant of the one thing leads to a necessary implication of the grant of the other, by which alone the thing can be conveniently exercised. Such is the argument, and it is certainly one of powerful in-

(a) 1 *Str.* 659. 3d point. See also *Dean and Chapter of Ely v. Warren*, 2 *Atk.* 189. *Stanley v. White*, 14 *East*, 341.

ference. I rely less on the rent reserved, which, however seems more applicable to a corporeal than an incorporeal hereditament, because there has been some controversy on that point. It is contended on the other hand, that as the put fishing and wheel fishing are excepted out of the grant, and as these can only be enjoyed by means of posts and stakes affixed to the soil, therefore no right of soil passed to the grantee, the soil being for this purpose excepted out of the grant. I should, however, derive from this exception an argument of a different kind, viz. that all that is not taken away by it passes by the grant. The terms on which the put and wheel fishing is excepted to the grantors are not particularly stated; it no doubt appears to give them a right of using the soil for that purpose; but it does not appear to repel the general right to the soil arising from the grant of the halves and halvendoles, &c. I do not found my opinion on this being a sole right of fishery, or coming within any particular description of fishery under which the soil must pass; but I think that under the circumstances we ought not to quash the order of sessions, unless we are satisfied that the sessions could not, upon any reasonable ground, conclude that by this grant of halves and halvendoles, &c. some territorial right was conveyed.

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LE BLANC J. This is an application to quash an order of sessions; and we must determine before we make the rule absolute, that the court of quarter sessions have acted wrong upon the facts disclosed to us by this case. It appears, from what has been said at the bar, that this is the most perfect statement of the case which the sessions are able to make, and upon this case

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they have confirmed the rate. The case, as far as respects the property rated, merely states that the appellant is rated "for the fishery." It must be taken, however, to mean the fishery mentioned in the case; and then we are to collect from the statement what sort of fishery this is, in order to see whether it is in any manner connected with the soil. In determining this I should be inclined to rest very much on that which is stated at the close of the case, viz. that the appellant uses nets, which the fishermen lay upon the beach or bed of the river, and that sometimes they affix one end of the net to a pole stuck into the bed of the river. But we must also refer to the grants. It is clear, I think, that by the original grant there is a conveyance of the right of soil, or a territorial right. The grant is of "all that our fishery of the halves and halvendoles, with the fishings, with the appurtenants to the halves due and accustomed within the river *Severn*, with all royal fishes." Such is the original grant. The derivative grant of 1633 is for a term of years of one fourth part of all those fishings of the halves and halvendoles, and of the fishings, with the appurtenants to the halves due and accustomed within the river *Severn*; not giving so extensive a right as the original grantees had, but giving the fishery in the terms which I have stated. The sessions have not stated what is meant by the halves and halvendoles; whether a particular spot in the river, or a description of land, or a certain portion of the fishery. We are left to collect that from the case as stated. I profess myself at a loss to understand the meaning of these terms except as far as it may be collected from the subsequent statement of what the appellant has enjoyed. It is stated that he has been regularly

in the enjoyment of the fishery between the two termini mentioned in the demise, varying the situation as the current of the river changed, and that he has occasionally used the bed of the river; but it does not appear that any right is granted to him by the conveyance of 1633, except under the words "halves and halvendoles." There is, however, a grant of royal fish, which it has been contended, is a great presumption that the soil passed, because it is a sort of right appurtenant to the soil. That right the appellant enjoys with the exception of put and wheel fishing, and the royal fish annexed thereto. How far the exception leads to any inference as to the extent of the right reserved to the grantors, it is unnecessary to consider. They had the whole of the fishings, as well that with nets as the wheel and put fishing, at the time of the grant, and might have granted the whole independently of the soil, or might have portioned out the right of fishing with the soil, reserving another portion with the soil to that extent. Under an ignorance of the meaning of the terms, "halves and halvendoles," when we see that the appellant has been in the constant exercise of landing nets on the shore and fixing them to poles in the bed of the river, it is impossible to say that the sessions have done wrong in making this rate on the appellant, as having a right to the soil.

BAYLEY J. I am of the same opinion. In order to be rateable the party must be the occupier of land; a mere incorporeal fishery does not fall within the stat. 43 Eliz. as the subject of rate. The question then is whether we may consider the appellant as the occupier of land. The sessions have confirmed the rate, and

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they were the proper persons to draw a conclusion from the evidence, if any could be drawn; and if enough is stated to support their conclusion, that is sufficient. It is stated by Lord *Hale* that a fishery may be either unconnected with the soil, or may be connected with it. I should doubt very much if the grant of a fishery would convey the soil and every thing underneath it, such as all the minerals, though I can conceive that it may pass so much of the soil as is connected with the fishery. It is admitted that by the grant of 1625 the soil passed to the grantees. In 1633 one-fourth part of the halves and halvendoles was granted to *Rusb* from whom the appellant derives title, and subsequently the whole vested in the appellant. In order to form a judgment whether this was a grant of a mere incorporeal hereditament or not, we must look at the terms of the grant, and in what manner the grantee has from time to time exercised the thing granted. Now it appears that he has exercised, not merely the right of fishing, but of landing his nets on the beach or any part of the bed of the river wherever he thought fit; and he also has been used to drive stakes into the ground for the purpose of affixing his net to them. There is, however, no privilege granted by the deed to use the beach or bed of the river for any such purpose, there is none at least granted in express terms. But it is said that it would pass as incident to the grant; and if it were necessary to the exercise, it might and would pass as incident; but to say that it would pass is begging the question, because it is assuming that it is necessary; but of that the sessions were the proper judges. There are many instances of these rights of fishery being exercised without landing the nets on the beach or bed of the river, or driving

driving poles into the ground, such as the fisheries in the *Thames*, the *Scutthampton* and other rivers, which are carried on by means of boats alone for that purpose. Therefore it is not a necessary incident to such a right as this, that the party should have the privilege of landing nets on the beach or of driving stakes. If then this be not an incidental privilege, nor one which is granted in express terms, to what else can the exercise be referred, except to its being a grant of a fishery of such a nature as conveyed at least the surface of the soil? I do not lay much stress on the exception of the put and wheel fishing in favour of the grantors, which would equally interfere with the right of the grantee, whether his right was an incorporeal one or not. It was therefore only meant by such exception to reserve to the grantors the right of putting down puts and wheels without being liable to an action for so doing, and to restrain the grantee from doing it. If the use of puts and wheels was a common mode of exercising such a fishery, it would have passed to the grantee unless it had been excepted; it might therefore be excepted on that account. On the other ground however it seems to me, that the sessions were warranted in drawing the conclusion they have done. It was thrown out in the course of the argument that a waggon-way was held not rateable. But when that question comes to be examined it will be found that *Rex v. Jolliffe* does not authorize a position so general. There the person who was rated was not the occupier of the way-leaves, but only used them by the consent of another, who was the occupier; therefore that case does not conclude the question.

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DAMPIER J. The facts are not so fully stated as might be wished, but it is said that the sessions are not able to give us any fuller information, and therefore we must decide upon the facts as they stand. I do not think that the sessions have done wrong. It is very properly admitted that the soil passed under the first grant, the words of that grant are large enough to carry it, and the exercise of the right shews it. It does not appear that any severance of the soil and fishery took place in the interval between the first and second grant; the words of the second grant are to be taken as strong against the grantors as their sense will admit, and they are sufficient to pass the soil, unless such a construction be negatived by the exercise of the right, which so far from negating confirms it. There are other circumstances tending to the same conclusion; a rent is reserved: a rent indeed may be reserved out of, or more correctly speaking, in respect of an incorporeal hereditament; but the question here is whether this is not a reservation which does not merely lie in grant or covenant, but also in debt. Another circumstance shews that the soil did pass. It is not stated, nor does it appear whether put and wheel fishing was a subsisting mode of fishing at the time of the second grant, or whether it originated with the reservation; but the reservation of a partial interest in the soil shews that the parties contemplated that the whole would otherwise have passed. Then the exercise of the right has been by drawing the nets on the soil, as to which it is argued that it may be referred either to a right of soil or easement upon it. Certainly it may be so, and if the sessions had found it to be an easement, that might have made a difference; but they have not so found, and it seems to me in the absence of other evidence,

dence, rather to be referable to the right of soil. It seems then that the words of the grant are sufficient to pass the soil, the exception shews that the wheel and put fishery would have passed it, if it had not been excepted, and the exercise concurs to shew that the soil did pass.

Order of sessions confirmed.

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The KING *against* The Inhabitants of the Township of THWAITES.

Wednesday,
June 30th.

UPON an appeal against an order of two justices, for the removal of *John Huddleston*, his wife and children, from *Harrington* to *Thwaites*, both in the county of *Cumberland*, the court of quarter sessions confirmed the order, subject to the opinion of this Court on the following case :

The pauper, *Huddleston*, was born in *Thwaites*, but was afterwards regularly bound apprentice to one *R. Cals*, in the township of *Brigham*, and duly served and resided his whole time (seven years) in the said township. *T. Cals* the father of *R. Cals*, resided at *Brigham* under a certificate from the churchwarden and overseers of the township of *Sunderland*, which had been delivered to the parish officers of *Brigham*, acknowledging “ the
“ said *T. Cals* and *Jane* his wife to be legally settled
“ within their township, and that as such they did there-
“ by promise and engage for themselves and successors,
“ churchwarden and overseers, to receive them the said
“ *T. Cals* and *Jane* his wife, *their child or children born or*
“ *to be born* in their said township as persons legally
“ settled whenever they or any of them should become
“ chargeable,

A parish certificate granted to *T. C.* and *J.* his wife, engaging to receive them, *their child or children born or to be born*, only extends to a son, born at at the time of granting the certificate, so long as he continues a part of his father's family; therefore where the son married, and resided with his family apart from his father, in the certified parish: Held that his apprentice gained a settlement by serving him in the said parish.

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“chargeable, or upon any other occasion whatsoever.”
R. Cafs, the pauper’s master, was born at the time of the certificate so granted and delivered; and during the time of the pauper’s serving him was a married man residing with his family in the township of *Brigham*, apart from his father; but it did not appear that he had gained any settlement there.

The question for the opinion of the Court is whether the pauper gained a settlement in *Brigham* by such service and residence with *T. Cafs*.

Fell and *G. Lamb*, in support of the order of sessions, contended that he did not, inasmuch as *R. Cafs* the son, by reason of his being under the protection of the certificate, was not in a condition to enable a person to gain a settlement by serving him as an apprentice. A child may be virtually included in a certificate granted to the father, though not named; according to *Rex v. Sherborne (a)*, and *Rex v. Bray (b)*: and according to *Rex v. Hampton (c)*, *Rex v. Alfreton (d)*, and *Rex v. Sowerby (e)*, the wife or child, though not named, remain part of the person’s family to whom the certificate is granted after his death. Then what difference is there in point of law whether the separation be caused by the act of the party or by the act of God? It is true that in *Rex v. Heath (f)*, and *Rex v. Mortlake (g)*, it was ruled that a child, where he is not named, may by his own act separate himself from his father’s family, and become thereby discharged from the certificate; but *Rex v. Sowerby* has decided that the carrying on business for himself is not

(a) *Burr. S. C.* 182.(b) *Ibid.* 259.(c) 5 *T. R.* 266.(d) 7 *T. R.* 471.(e) 2 *East*, 276.(f) 5 *T. R.* 583.(g) 6 *East*, 397.

such an act as will work a discharge. And on the other hand *Rex v. Testerton (a)*, and *Rex v. Bath Easton (b)* shew that if the children be named in the certificate, they are still protected by it, though they separate and become distinct from the father's family. Now whether they be inserted nominatim, or described in the certificate in such adequate terms as clearly designate them to be objects of the certificate, must be the same thing in effect; and here *R. Cass*, the son, who it appears was born when the certificate was granted, is as clearly designated by the words "child born" as if he had been named.

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Paley and *P. Courtney*, contra, were stopped by the Court.

LORD ELLENBOROUGH C. J. This appears very clearly to have been a service under an indenture of apprenticeship to a person who at the time was not protected by the certificate, and consequently such a service as coupled with the residence will entitle the pauper to a settlement in *Brigham*. The certificate engages "to receive the father and mother, their child or children born or to be born." The parish officers perhaps did not know the name of the son, or probably they were ignorant of the fact that they had any son at the time; but it is clear that they meant only to comprehend the whole of the family, with which the parents should migrate. The parents do migrate with their son into another township, and there the son afterwards separates from them, and becomes

(a) 5 T. R. 258.

(b) 8 T. R. 446.

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himself the head of a distinct family, and so from that time was emancipated. This is a main feature that distinguishes this case from *Rex v. Sowerby*, where the party continued to reside with his mother, and brings it within the case of *Rex v. Mortlake*; which is also an authority to shew that the pauper by serving the son, under these circumstances, in the certified township will thereby gain a settlement in that township.

LE BLANC J. It seems to be admitted, that this case falls precisely within the determination of *Rex v. Mortlake*, unless it can be distinguished upon the terms of the certificate. The circumstance of distinction relied on is this, that the certificate is in its terms an acknowledgment of "the child or children born or to be born;" and this, it has been argued, is the same thing as if the child had been expressly named by its christian name in the certificate. If this were so, there would be an end of the question; for it has been determined, and that determination has never been shaken, that a child named in the certificate stands precisely in the situation of the father, that is, as one of the principals mentioned in the certificate; and therefore if the son had been named in this case, it would follow that a service with him as apprentice would not have conferred a settlement in the certified parish. No case, however, has been cited, and the industry of the learned counsel who have argued this question would probably have discovered one, if any such existed, to shew that any thing less than an express mention of the person by name will have the same effect as naming him; or that describing him by the

the words "child born or to be born" has ever been held to be equivalent. Where the child is named, there is some reason for saying that he still remains under the protection of the certificate, notwithstanding his complete separation from his family; but the Court will not be disposed at this time of day to extend that doctrine to cases where he only comes under the general denomination of "child born or to be born." If this be so, it seems to me that the case cannot be distinguished from *Rex v. Mortlake*. We must then advert to that decision. It was there decided that where the son of a certificated person (he not being named in the certificate, but only falling within it as one of his father's family) quitted the family, and married, and occupied a separate house in the certified parish, he was no longer under the protection of the certificate; but was then in such a situation as gave his apprentice a capacity to gain a settlement by serving him in that parish. This was so decided by reading the conjunction "or" in the words of the stat. 12 *Anne*, "who did come into *or* shall reside in any parish," as copulative. The Court thought that although the son as one of the father's family was once covered by the certificate, yet when he became the head of a distinct family, he no longer continued a person, within the meaning of the statute of *Anne*, with whom an apprentice could not gain a settlement. In *Rex v. Sowerby*, the son was residing with his mother after his father's death, although he carried on business for himself: and the continuance under the maternal was considered the same as the paternal roof. The other cases relied on were cases where the child was named in the certificate. The current of all the authorities seems to decide this, that if a person, who is not named in the

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certificate, but only comes within the scope of it as being the child of a person named, abandon the roof of his parents and become himself the parent stock of another family, such person is not only capable of gaining a settlement himself, but also of being the means of others gaining a settlement by service with him; although his father remains protected by the certificate. I am therefore of opinion that the decision of the sessions was wrong.

BAYLEY J. I am of the same opinion. The provisions of the certificate act seem to place this case in a clear point of view. The statute enacts (a) “ that if any person or persons that shall come into any parish or other place there to inhabit and reside, shall deliver to the churchwardens or overseers a certificate under the hands and seals of the churchwardens and overseers of any other parish, township, or place, thereby acknowledging *the person or persons mentioned* in the said *certificate* to be an inhabitant or inhabitants legally settled in that parish, township, or place, every such certificate shall oblige the said parish or place to receive and provide for the *person mentioned* in the said certificate, together with his or her family, whenever they shall happen to become chargeable to the parish, township, or place to which such certificate was given.” Therefore if a certificate be granted to a person by name, the parish is bound to provide for him and his family: but if several members of a family be named in it, the parish must provide for each as distinct and separate members unconnected with each other. Who then are the persons named in this

(a) 8 & 9 W. 3. c. 30. s. 1.

certificate whom the township acknowledge as their inhabitants legally settled? The father and mother only; for "their child or children born or to be born" comprehends nothing more than their family; the children are to be received back as part of the family of the father, and not because they are acknowledged as settled inhabitants of the certifying township. In the cases relied upon the certificate not only named the parents but the children also. But where children come within the certificate, merely under the description of the family of the person named, *Rex v. Darlington*, *Rex v. Heath*, and *Rex v. Mortlake* have decided, that they continue under the protection of the certificate so long only as they constitute a part of the family. That is the plain and broad line of distinction.

Per Curiam,

Order of Sessions quashed.

PEARSE *against* CAMERON.

Thursday,
July 1st.

TINDAL moved for a rule nisi for leave to amend the original writ, declaration, nisi prius record, and rule of reference in this cause, by inserting therein the sum of 10,000*l.* instead of 2500*l.*, which was the sum laid in the declaration. The action was brought on a balance of accounts, and at the trial a verdict was taken for the plaintiff for the damages in the declaration, subject to a reference of all matters in difference. The affidavit stated that a much larger sum than that for

Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the Court will not give leave to increase the sum in the declaration and rule of reference on an affidavit that a larger sum

will probably be proved before the arbitrator.

It seems that under a reference of all matters in difference the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken.

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which the verdict was taken, would probably be proved before the arbitrator; and assigned as a reason for so small a sum being originally inserted, that the clerk of the plaintiff, who made the affidavit of debt, not having the vouchers before him, could only swear with certainty to 2000/.

Lord ELLENBOROUGH C. J. said that the Court could not increase the sum as prayed; that although the arbitrator could not go beyond the sum of 2500/ in his award in this action, yet as all matters in difference were referred to him, he might perhaps make his award for a larger sum as to those additional matters referred to him; for which, though the party would not have a remedy under the verdict, he might have a remedy under the award. As far as respected the cause the smallness of the sum might have been an inducement to the other party to submit to the reference.

Per Curiam,

Rule refused.

Thursday,
July 11.

CHENOWETH *against* HAY.

Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was go-

ing towards his house, upon which he concealed himself in the back room and desired his neighbour to watch, and when told that the officer had gone past his house and had left the street, immediately returned home: Held that this was an act of bankruptcy within the words of 13 *Eliz. c. 7.* and 1 *J. I. c. 15.* "otherwise absenting himself to the intent to delay creditors," although it appeared not only that no creditor was delayed, but that none could possibly be delayed.

and

and that the plaintiff had made his election under the 49 G. 3 c. 121. §. 14. by proving his debt, under the commission. The question turned upon the act of bankruptcy, as to which a witness, who was a neighbour of *Haley*, proved that on the 23d of *April* *Haley* came to his shop, and said that he expected every moment to be arrested, but did not mention any means of avoiding it. When he was about to leave the witness's shop, a sheriff's officer having just gone down the street, the witness told *Haley* that he was going towards his house; on which he became agitated, and desired the witness to watch him; and that he might not be seen by the officer, went into the witness's back shop; and told him that he went thither for that purpose, and was afraid that the officer had a writ against him. He wished the witness to see if the officer went to his premises. The officer did not go thither, but after going to another house, left the street; and when he was gone the witness told *Haley*, who still continued in the back shop; upon which he said, "Thank God, I will now go in;" and the witness then saw him go home. The learned Judge was of opinion that *Haley*, inasmuch as he was about to leave the witness's shop when he received the intelligence about the sheriff's officer, and thereupon retired and concealed himself in the back shop, and continued there until he knew that the officer had passed his house, and was gone away in another direction, and this for the express and declared purpose of avoiding an arrest, had absented himself to the intent to delay his creditors within the meaning of 13 *Eliz.* c. 7. §. 1. and 1 *Jac.* 1. c. 15. §. 2., although he had not departed from his dwelling-house to that intent; which was a distinct act of bankruptcy created by a

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different branch of the clause. Whereupon a verdict was found for the defendant.

In *Easter* term a rule nisi was obtained for a new trial, on the ground that a delay in returning to his house, caused by the mere apprehension of arrest, had never been decided to amount to an act of bankruptcy; and the case was likened to *Garret v. Moule (a)*. And now the rule coming on

Lens Serjt. and *Casberd* were called upon to support it, who admitted that it had been resolved that the departure of a trader from his dwelling-house, with intent to delay his creditors, was an act of bankruptcy, without proof of any actual delay (*b*); but contended that this case did not fall within that rule, because here the case stood, not only without proof of any actual delay, but there was positive evidence excluding the possibility of any delay; for it appeared that the officer never went to the house of *Haley*, and that *Haley* returned home immediately after the officer had left the street. There is no case where all possibility of delay having been positively negatived as in this case, the party's merely postponing his return home for a short time, under the fear that he will be arrested, without proof that such fear was well founded, or that any writ was out against him, has been held to be within the meaning of the statute.

LORD ELLENBOROUGH C. J. The instances enumerated in the two acts are the several criteria of insol-

(a) 5 T.R. 575.

(b) 9 East, 487., *Robertson v. Liddell*.

vency, by which, when coupled with an intent to hinder his creditors, the party is to be adjudged bankrupt. *Robertson v. Liddell* decided that the intent and not the actual delay was what the statute meant; and the moment the Court have determined that, it becomes immaterial whether there was a possibility or not of delay.

LE BLANC J. The difficulty is how to draw any other line than the intent.

BAYLEY J. The act of bankruptcy depends on the intent to delay, and not on the intent being productive of the effect of delay.

Per Curiam,

Rule discharged.

Pell Serjt. and *Gifford* were to have shewn cause.

WEEKS *against* A. SPARKE, W. SPARKE, and
W. SPARKE, Jun.

Thursday,
July 1st.

TRESPASS for breaking and entering the plaintiff's close, parcel of a common in the parish of *Inward Leigh*, in the county of *Devon*. Plea, the general issue; and the defendants also justified in right of *A. Sparke*, under a prescriptive right of common throughout the locus in quo at all times, as appurtenant to a mes-

Trespass quare clausum fregit. Plea of prescriptive right of common over the locus in quo at all times for his cattle, levant and couchant; replication prescribing in right

of his messuage to use the locus in quo for tillage with corn, and until the taking in of the corn to hold and enjoy the same in every year, and traversed the defendant's prescription; on which issue joined: Held that many persons besides defendant having a right of common over the locus in quo, evidence of reputation as to the right claimed by plaintiff was admissible, a foundation being first laid by evidence of the enjoyment of such right; and that plaintiff's right might legally exist as a qualification of defendant's right, and was not repugnant to it.

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fuage and land belonging to the said *A. Sparke*, for his cattle, levant and couchant; and that the locus in quo was wrongfully inclosed, so that they could not enjoy the said right of common, &c. Replication that the plaintiff was seised in fee of a messuage called *Lower Gosbuisb*, in the parish of *North Lew*, and that there was and immemorially hath been another messuage also called *Lower Gosbuisb*, and prescribed in right of his messuage to use the locus in quo for tillage with corn, and until the taking in of the corn thereby produced, to hold and enjoy the same in every year in which the same might be tilled according to the rules of good husbandry, and in which the same was not so tilled by the occupier of the other messuage called *Lower Gosbuisb*, and traversed the defendant's prescription; upon which traverse issue was joined. At the trial before *Chambre J.*, at the last assizes for the county of *Devon*, the plaintiff proved two instances of the exercise of the right of tillage upon the common, which consisted of about 300 acres; one as far back as 60 years ago, by the then occupier of his messuage, and another by his father, whom he succeeded about 11 years ago, for three successive years; and that the common, from the ridges and furrows now to be seen, had the appearance of having been at some time all tilled. The plaintiff also by several witnesses gave evidence of reputation as to the existence of such right, viz. that the occupiers of the two messuages called *Lower Gosbuisb* had the right of tillage. This evidence was objected to and the case of *Morewood v. Wood* (a) was cited, but the learned Judge admitted it, being of opinion that as both the plaintiff's

(a) 14 *Eq.*, 327.

and the defendants' claims were prescriptive, and instances of the actual exercise of the right claimed by the plaintiff had been proved, evidence of reputation to confirm the other evidence was admissible. The same witnesses who proved the plaintiff's case, proved also on cross-examination that the defendants turned on their cattle upon the common at all times. The defendants called no witnesses. The learned Judge stated to the jury that the right of common claimed by the defendants was denied only in respect of its generality; the plaintiff insisting that it was qualified by the right of tillage and inclosure, stated in the inducement to his traverse, and consequently that the defendants could not have such right of common as they alledged in their plea. That the right claimed in respect of the two farms appeared to be inconsistent with the enjoyment of any pasturage by the other commoners. It was not limited to the use of any particular part or proportion of the common, or qualified by any terms or conditions whatever, but might be exercised every year, and to the extent of inclosing, tilling, and taking crops from the whole common. The evidence and the pleadings were equally unqualified. Independently of this objection, either as an objection in law, or to the probability of the fact; the learned Judge thought the evidence of enjoyment very unsatisfactory, particularly from these circumstances, that the two farms were small ones, and the privilege contended for, if it existed in its fullest extent, would have been of much more value than the estates themselves, and yet with such inducements to exercise it, it did not appear that they had done so on more than two occasions, besides that which gave rise to this action, one of them 11 or 12 years ago, and the

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other 60 years ago, or more probably taking three successive crops on each occasion, but exercising the supposed right only upon a small proportion of the common. The jury, however, found a verdict for the plaintiff.

In *Easter* term *Lens* Serjt. obtained a rule nisi for a new trial, upon the ground, 1st, That this was a verdict against evidence; 2d, That the prescriptive right claimed in the replication was in destruction of the defendant's right, and repugnant to it; 3dly, That evidence of reputation was admitted.

Moore, Buller, and Gifford now shewed cause, and confined themselves to the two last points, it being admitted on the other side that if reputation was held to be admissible in this case, it would make the balance of evidence preponderate in favour of the plaintiff. Upon the 2d point they contended, that these two rights might well stand together, that of the plaintiff being a qualification of the general right of the defendant over the whole common; and the plaintiff's right was good in point of law, for it might have had a legal commencement; as suppose it introduced at the same time with the grant of common by the owner of the *Gosbuisb* tenements, then the owner of the soil of the whole common; the grantor might qualify the grant in this way. Upon this point they cited *Bateson v. Green* (a), *Clarkson v. Woodhouse* (b), and *Spooner v. Day* (c); and the Court intimated an opinion that this right was pleaded as a qualification of the defendant's right, which was general and unqualified, and that the case was within the scope of

(a) 5 T.R. 411.

(b) *Ibid.* 412. n.(c) *Cro. Car.* 437.

Bateson v. Green, where the right claimed by the lord, if exercised to its full extent, would have made the rights of the commoners of little or no value. Lastly, they contended that the evidence was properly received. The objection is that this was hearsay evidence in a matter of private right, and that hearsay evidence can only be received where a public right is in question. But authorities are not wanting to shew that such evidence was admissible in this case. In *Bull. N. P.* 295. it is laid down that in questions of prescription it is allowable to give hearsay evidence in order to prove a general reputation; and the case of *Skinner v. Lord Bellamont* is cited, where the defendants were admitted to give hearsay evidence, upon an issue respecting a right to a way over the plaintiff's close. So in *Rex v. Eriswell* (a) *Grose J.* considered it as an exception to the general rule, that prescriptive rights may be proved by reputation; and *Buller J.* observed, that hearsay evidence had been received to prove whether land were or were not parcel of a certain tenement (b). In *Morewood v. Wood* (c) it was admitted on all hands that reputation was evidence in support of a custom; and Lord Kenyon assigns the reason, because all mankind being interested in the subject, it is to be presumed that they will be conversant with and discourse together upon it; which, he says, cannot apply to private prescriptions: but surely it applies, though perhaps not in an equal degree to prescription as well as custom. The better reason seems to be, and that will apply equally to both custom and prescription, that it is evidence of declarations made by persons who had not any interest at the time for making

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(a) 3 T.R. 709.

(b) *Ibid.* 719.

(c) 14 East, 327. n.